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Davis.

Mr Justice Catron

SUPREME COURT OF THE UNITED STATES.

No. 178.

THE UNITED STATES OF AMERICA, TO THE USE OF FANNY B. ROGERS, ADMINISTRATRIX, AND JAMES H. ROGERS, ADMINISTRATOR, OF GEORGE T. ROGERS, DECEASED, PLAINTIFF IN ERROR,

vs.

EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, AND ROBERT A. BAGER, SURVIVORS OF MAJOR J. THOMAS, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 District court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a special term of the district court of the United States for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the third Monday (being the twenty-first day) of April, A. D. 1862.

Present: the honorable Andrew G. Miller, judge of said court, presiding; Darius C. Jackson, marshal; John M. Miller, clerk.

Among other the following proceedings were had, to wit:

UNITED STATES OF AMERICA, for the use of FANNY B. ROGERS, administratrix, & JAMES H. ROGERS, administrator of George T. Rogers, deceased, plaintiff, *vs.* EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, & ROBERT A. BAKER, survivors of Major J. Thomas, deceased, defendants.	At law.

Præcipe for summons.

Be it remembered that heretofore, to wit, on the fifteenth day of July, A. D. 1861, came the United States of America, prosecuting for the use of George T. Rodgers, by his attorney, Messrs. Carpenter & Gridley, and filed their præcipe for a summons against the above-named defendants, as follows:

THE UNITED STATES OF AMERICA, for the use of GEORGE T. ROGERS, *vs.* EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, & ROBERT A. BAKER, survivors of Major J. Thomas, deceased.	District court of the United States of America for the district of Wisconsin.

Issue a summons in the above-entitled cause of a plea of debt to the plaintiffs, damage twenty thousand dollars, returnable the first Monday of August next ensuing.

CARPENTER & GRIDLEY,
Plaintiffs' Attorneys.

To J. M. MILLER, Esq., *Clerk.*

Whereupon a summons issued as follows:

2 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon Edgar Conklin, James Ewen, John B. Wilbor, Benjamin F. Moore, and Robert A. [SEAL.] Baker, survivors of Major J. Thomas, deceased, to appear before the district court of the United States of America for the district of Wisconsin, aforesaid, at Milwaukee, on the first Monday of August ensuing, then and there to answer unto United States of America, for the use of George T. Rogers, in a plea of debt to their damage twenty thousand dollars, which shall then and there be made to appear, and of this writ make due return.

Witness the honorable Andrew G. Miller, judge of the said district court of the United States, at the city of Milwaukee, in the said district of Wisconsin, this fifteenth day of July, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

J. M. MILLER, *Clerk.*
CARPENTER & GRIDLEY, *Attorneys.*

Return.

And afterwards, and on or before the return dav of said summons, came the said marshal and returned the same, with his return endorsed thereon, as follows:

"Served on the within named James Ewen, John B. Wilbor, and Robert A. Baker, by showing them this summons, and delivering to each a copy thereof, this 20th day of July, 1861; the within named Edgar Conklin not found. Served on the within named Benjamin F. Moore by leaving a copy of this summons at his usual place of abode, he not being found, this 20th day of July, 1861.

"D. C. JACKSON, *Marshal,*
"By A. B. PRATT, *Deputy.*"

Fees $13 60.

And afterwards, to wit, on the fifth day of August, A. D. 1861, came the said plaintiffs, by their said attorneys, and filed their declaration, as follows:

3 *Declaration.*

In the district court of the United States for the district of Wisconsin.

UNITED STATES OF AMERICA, to the use of GEORGE T. ROGERS, *vs.* EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE and ROBERT A. BAKER, survivors of Major J. Thomas, deceased.	Of the 1st Monday of August, A. D. 1861.

The United States of America, to the use of George T. Rogers, a citizen of the State of New York, plaintiff, by Carpenter & Gridley,

attorneys, complains of and against Edgar Conklin, James Ewen, John B. Wilbor, Benjamin F. Moore and Robert A. Baker, survivors of Major J. Thomas, deceased, defendants, served with process of a plea, that they render to the plaintiff the sum of twenty thousand dollars, lawful money of the United States, which they owe to, and unjustly detain from the plaintiff; for that, whereas the said defendants, and the said Major J. Thomas, now deceased, heretofore, to wit, on the 15th day of June, A. D. 1857, at Milwaukee, in said district of Wisconsin, by their certain writing obligatory, sealed with their seals, respectively, and to the court here now shown, the date whereof is the day and year last aforesaid, acknowledge themselves firmly bound and held unto the United States of America in the sum of twenty thousand dollars, above demanded, to be paid to the United States of America. And the said plaintiff further says and avers that the said writing obligatory was, and is, subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit:

4 that the President of the said United States had before then appointed the said Major J. Thomas marshal of the United States for the district of Wisconsin, to have and to hold the said office, with all the powers, privileges and emoluments thereunto legally appertaining, during the pleasure of the President of the United States for the then time being, and until the end of the then next session of the Senate, and no longer, as in and by a commission under the hands of the said President and the Secretary of State and the seal of the United States, bearing date the 14th day of May, in the year of our Lord one thousand eight hundred and fifty-seven, more fully appeared: it is provided that the condition of such obligation was such, that if the said Major J. Thomas had truly and faithfully executed, and should faithfully perform, execute and discharge, by himself and by his deputies, all and singular the duties of the said office of marshal according to law, then said obligation, writing obligatory, to be void and of none effect, otherwise to be and remain in full force and virtue. And the plaintiff further avers that said Major J. Thomas continued to hold, exercise and enjoy the said office of marshal as aforesaid, under and in pursuance of said appointment mentioned in said writing obligatory, until afterwards, to wit, on the 1st day of July, A. D. 1859, when he departed this life.

First breach.

And the said plaintiff for assigning a breach of the condition of the said writing obligatory, according to the form of the statute in such case made and provided, in fact says, that after the making of said writing obligatory, and while the said Thomas was holding and exercising the said office by virtue of said appointment recited in said

5 writing obligatory, to wit, in the city of Milwaukee in said district, on the 22nd day of July, A. D. 1857, one Henry C. Manning, for and on behalf of George T. Rogers, a citizen and resident of the State of New York, and for the purpose of obtaining out of the district court of the United States for the district of Wis-

consin a writ of replevin in favor of said Rogers, as plaintiff against Henry W. Remington and John T. Martin, jun'r, defendants, to replevy certain lumber, made, subscribed and swore to his certain affidavit in writing according to law, wherein he on his oath stated that the said Rogers was then the owner of the property described as follows, to wit: a quantity of lumber, consisting of about three hundred and seventy-five thousand feet, composed of boards, planks, siding and joist, then lying and being in the yard at Prairie du Chien, then formerly occupied by H. C. Manning & Co., and being the lumber sold by said H. C. Manning (said affiant) and his partner to the said Rogers, and that the said property was then wrongfully detained by the said Remington & Martin from the said Rogers; that the alleged cause of said detention was a pretended purchase or negotiation for a purchase by said Remington and Martin, or one of them, from said H. C. Manning, while he was the owner thereof, but which purchase was never consummated; that the said property had not been taken for a tax assessment or a fine pursuant to a statute, nor seized under an attachment or execution against the property of said Rogers, and that the said property was worth, in the opinion of said affiant, from 8,000 to 10,000 dollars, and that the said Manning, for and on behalf of said Rogers, thereafter, to wit, on the 23d day of July, A. D. 1857,

6 at the city of Milwaukee aforesaid, exhibited said affidavit by him subscribed in the office of the clerk of the said district court; and that thereafter, to wit. on the day and year last aforesaid, the said Rogers sued and prosecuted out of the said district court a certain writ of replevin in favor of said Rogers, as plaintiff, and against said Remington and Martin, as defendants, which said writ was in due form of law, sealed with the seal of said court, tested in the name of the judge of said court, signed by the clerk of said court, and directed to the marshal of the district of Wisconsin, and which said writ of replevin recited that said Rogers complained that said Remington and said Martin did unjustly detain from him, said Rogers, a quantity of lumber, consisting of about three hundred and seventy-five thousand feet, composed of boards, planks, siding and joist, and commanded said marshal that if the said Rogers should give him security, as requ red by law, to prosecute his said Rogers's said complaint and to return the said goods and chattles, said lumber, if return thereof should be adjudged, and to pay all such sums of money as might be recovered against him thereupon, that then the said marshal should cause the said goods and chattles, said lumber, to be replevied and delivered to the said Rogers without dely, and also that he should summon the said Remington and the said Martin to appear before the judge of the said district court at Milwaukee, on the 1st Monday of August then next, to answer the said Rogers in the premises.

7 The plaintiff further says and avers, that afterwards, to wit, on the 27th day of July, A. D. 1857, the said Rogers caused the said affidavit and said writ of replevin, so tested, signed, sealed and directed, to be delivered to the said Thomas, who then was holding and exercising the said office of marshal, under and by

virtue of said appointment, as recited in said writing obligatory, to execute and return according to law; and that afterwards, to wit, on the 27th day of July, A. D. 1857, the said Rogers caused security as required by law to be given to said Thomas, marshal as aforesaid, in the sum and to the amount of twenty thousand dollars, by bond or writing obligatory of the said Manning and one Ralph Cheney, conditioned as by law required, that if the said Rogers should prosecute his said action, and should return said lumber to the said Remington and the said Martin, if return thereof should be adjudged, and should pay such sum as might for any cause be recovered against said Rogers in said action, then said bond should be void and otherwise of force, and that the said Thomas, as marshal as aforesaid, then and there received said bond with said writ and affidavit, upon which said bond said Manning and the said Cheney had made and subscribed their respective affidavits, wherein they did swear that they were each worth the sum of twenty thousand dollars over and above all their debts, and exclusive of property exempt from execution; and that said Thomas, then and there, as marshal aforesaid, endorsed upon said bond his approval thereof; and the plaintiff avers that it then and there became, and then and there was the duty of the said

8 Thomas, as marshal as aforesaid, under and by virtue of the appointment aforesaid, and in pursuance of the command and exigency of said writ, to take, replevy, and deliver possession of said lumber to said Rogers, according to law; and that afterwards, to wit, on the 27th day of July, A. D. 1857, the said Thomas still exercising said office, and having in his possession as such marshal the said affidavit, security, and writ of replevin, he, the said Thomas, marshal as aforesaid, under and by virtue of said writ, at Prairie du Chien, in said district of Wisconsin, seized, replevined, and took all of said lumber, as he was by said writ commanded, and which said lumber was then and there the property of the said Rogers, and of great value, to wit, the value of ten thousand dollars; and the plaintiff avers, that said Rogers did then and there, and while said Thomas held possession of said lumber as aforesaid, demand of said Thomas that he should then and there deliver possession of said lumber to him said Rogers, to wit, at Prairie du Chien, in said district; but the plaintiff avers that the said Thomas, marshal as aforesaid, by virtue of the appointment aforesaid, then and there neglected and refused so to deliver possession of said lumber to said Rogers, but did then and there thereafter suffer and permit said Remington and said Martin to take and have possession of said lumber the property of the said Rogers, and of the value of ten thousand dollars, and convert the same to their own use, without any lawful right or authority, and without taking from the said Remington and the said Martin any undertaking, bond or security, as by law required in that behalf.

9 And the plaintiff further avers that the said marshal made due service of said writ upon said Remington and said Martin, and summoned them as by said writ he was commanded as aforesaid, and made return of said writ, affidavit and security, to said court,

on the 1st Monday of August, A. D. 1857; the said Remington and the said Martin being, at the time said writ was issued and served, as aforesaid, residents and citizens of the State of Wisconsin; and said Rogers, when said writ was issued and served, as aforesaid, being a citizen of the State of New York.

And the plaintiff further avers that such proceedings were thereupon had that afterwards, to wit, on the 12th day of May, A. D. 1858, that it appearing to said court that return of the goods and chattels—lumber—replevied could not be made to the said Rogers, it was considered and adjudged by said court that the said Rogers have and recover of the said Remington the sum of 8,750 dollars, and also 459 dollars and 38 cents, which said sums had before then in said court in said action been assessed by a jury as the value of the said property replevied, and damages for the detention thereof by said Remington making in the whole the sum of $9,209 dollars and 38 cents, together with the sum of 251 dollars and 25 cents, his costs in said suit about in that behalf by him expended, and that he have execution therefor.

And the said plaintiff further shows that the said Remington was at the time of the rendition of said judgment, ever since has been, and now is, entirely insolvent.

Second breach.

10 And the said plaintiff, for assigning a further breach of the condition of said writing obligatory, according to the form of the statute in such case made and provided, further says, that after the making of said writing obligatory, and while the said Thomas was holding the said office by virtue of said appointment recited in said writing obligatory, to wit, in said district, on the 22d day of July, A. D. 1857, one Henry C. Manning, for and on behalf of George T. Rogers, and for the purpose of obtaining out of said district court another writ of replevin in favor of said Rogers as plaintiff against Henry W. Remington and John T. Martin, jun'r, defendants, to replevy certain other lumber, made, subscribed, and swore to his certain affidavit in writing, according to law, wherein he on oath stated that the said Rogers was then the owner of a quantity of lumber, consisting of about three hundred and seventy-five thousand feet, composed of boards, plank, siding and joist, then lying and being at the yard in Prairie du Chien, then formerly occupied by H. C. Manning & Co., and being the lumber sold by said Manning (said affiant) and his partner to the said Rogers, and that the said property was wrongfully detained by the said Remington and the said Martin for the said Rogers; that the alleged cause of said detention was a pretended purchase, or negotiation for a purchase, by the said Remington & Martin, or one of them, from the said H. C. Manning, while he was the owner thereof, but which purchase was never consummated; that the said property had not been taken for a tax assessment, or a fine pursuant to a statute, nor seized under an attachment or ex-
11 ecution against the property of the said Rogers, and that the

said property was worth from 8,000 to 10,000 dollars; and that the said Manning, for and on behalf of the said Rogers, thereafter, to wit, on the 23d day of July, 1857, at the city of Milwaukee, aforesaid, exhibited his, said Manning's said affidavit in the office of the clerk of said court, and that thereafter, to wit, on the day and year last aforesaid, the said Rogers sued and prosecuted out of said court a certain other writ of replevin in favor of him, said Rogers, as plaintiff, and against said Remington & Martin as defendants, which said writ was in due form of law, sealed with the seal of said court, tested in the name of the judge of said court, signed by the clerk of said court, and directed to the marshal of the district of Wisconsin, and which said writ recited that said Rogers complained that said Remington & Martin did unjustly detain from him, said Rogers, a quantity of lumber, consisting of about three hundred and seventy-five thousand feet, composed of boards, plank, siding and joist, and commanded said marshal that if the said Rogers should give him security, as required by law, to prosecute his said Rogers's said complaint, and to return the said goods and chattels—said lumber—if return thereof should be adjudged, and to pay all such sums of money as might be recovered against him, thereupon that then the said marshal shall cause the said goods and chattels—said lumber—to be replevied and delivered to the said Rogers without delay, and also
12 that he should summon the said Remington and the said Martin to appear before the judge of said court at Milwaukee on the 1st Monday of August then next, to answer the said Rogers in the premises. The plaintiff further says that afterwards, to wit, on the 27th day of July, 1857, the said Rogers caused said affidavit and said writ of replevin to be delivered to the said Thomas, who then was holding and exercising the said office of marshal under and by virtue of said appointment, and that afterwards, to wit, on the 27th day of July, A. D. 1857, the said Rogers caused security, as required by law, to be given to said Thomas, as aforesaid, in the sum and to the amount of twenty thousand dollars, by bond or writing obligatory of the said Manning and one Ralph Cheney, conditioned, as required by law, that if the said Rogers should prosecute his said action and should return said lumber to said Remington and Martin, if return thereof should be adjudged, and pay such sum as might for any cause be adjudged against him, said Rogers, in said action, that then said bond should be void and otherwise of force; and that said Thomas, as marshal as aforesaid, then and there received said bond, with said writ and affidavit upon which said bond said Manning and said Cheney had made and subscribed their respective affidavits, wherein they did each swear that they were each worth the sum of twenty thousand dollars over and above all their debts, and exclusive of property exempt from execution, and that the said Thomas then
13 and there, as marshal as foresaid, endorsed upon said bond his approval thereof; and the plaintiff avers that it then and there became, and then and there was the duty of the said Thomas, as marshal as aforesaid, in pursuance of the command and exigency of said writ, to take, replevy, and deliver possession of said lumber to

said Rogers, according to law; and that afterwards, to wit, on the 27th day of July, A. D. 1857, the said Thomas having in his possession, as marshal as aforesaid, the said affidavit, said security, and said writ of replevin, he, said Thomas, at Prairie du Chien in said district, under and by virtue of said writ, seized, replevied, and took all of said lumber, as he was by said writ commanded, which lumber was then and there the property of said Rogers, and of great value, to wit, of the value of ten thousand dollars. And the plaintiff avers that said Rogers did then and there, and while said Thomas held possession of said lumber, as aforesaid, demand of said Thomas that he should then and there deliver possession of said lumber to him, said Rogers, to wit, at Prairie du Chien in said district; but the plaintiff avers that afterwards, to wit, on the 29th day of July, A. D. 1857, the said Remington delivered to said Thomas a certain writing obligatory of him, the said Remington, John T. Martin, John Keeffe, and Andrew Proudfit, wherein and whereby the said Remington, said John T. Martin, said Keeffe, and said Proudfit, acknowledged themselves held and firmly bound unto the said Thomas, marshal as aforesaid, in the sum of twenty thousand dollars; that said writing obligatory recited that said Remington and John T. Martin, jun'r, had
14 required the return of said property replevied, as aforesaid, and expressed the condition that if said Remington and John T. Martin, jun'r, should deliver to the said Thomas, as marshal, said property, if said delivery should be adjudged, and should pay to him such sum as might for any cause be recovered against said Remington and said John T. Martin, jun'r, then said writing obligatory to be void, otherwise valid; and that thereupon the said Thomas, marshal as aforesaid, received said last mentioned writing obligatory, and wrongfully, and without any authority, and without the knowledge or consent of the said John T. Martin, said Keeffe, or said Proudfit, (said John T. Martin, said Keeffe, and said Proudfit having signed, sealed, and delivered said writing obligatory, as aforesaid, only as sureties for said Remington,) he, the said Thomas, marshal as aforesaid, erased and obliterated, or caused or permitted to be erased and obliterated, from the said writing obligatory the signature and seal of the said Remington, whereby the said writing obligatory became absolutely void in the law, as against the said John T. Martin, said Keeffe, and said Proudfit, and thereupon, and thereafter, and without requiring and receiving from said Remington, said Martin, jun'r, or either of them, any other bond, undertaking or security whatever, he, the said Thomas, marshal as aforesaid, under the appointment as aforesaid, permitted the said Remington and the said John T. Martin, jun'r, to have and to take possession and control and convert to their own use the said property so replevied by him, said Thomas, as aforesaid, which said property was then and there the property of the said Rogers, and of the value of ten thousand dollars; that said
15 marshal made service of said writ upon said Remington and upon said John T. Martin, jun'r, and summoned them as by said writ he was commanded, as aforesaid, and made return of said writ, said security given by said Rogers, and said mutilated and void

bond, to said court on the 1st Monday of August, A. D. 1857, the said Remington and the said Martin, jun'r, being at the time said writ was issued and served, as aforesaid, residents and citizens of the State of Wisconsin, and the said Rogers, when said writ was issued and served as aforesaid, being a citizen of the State of New York. And the said plaintiff further avers that such proceedings were thereupon had that afterwards, to wit, on the 12th day of May, A. D. 1858, that it appearing to said court that return of the goods and chattels—lumber—replevied could not be made to the said Rogers, it was considered and adjudged by said court that the said Rogers have and recover of the said Remington the sum of $8,750 dollars, and also $459 dollars and 38 cents, which said sums had before then in said court in said action been assessed by a jury as the value of the said property replevied, and damages for the detention thereof by said Remington, making in the whole the sum of $9,209 dollars and 38 cents, together with the sum of 251 dollars and 25 cents, his costs in said suit in that behalf by him expended, and that he have execution therefor.

And the said plaintiff further shows that the said Remington was at the time of the rendition of said judgment, ever since has been and now is, entirely insolvent.

16 *Third breach.*

And the said plaintiff for assigning a further breach of the condition of said writing obligatory, according to the form of the statute in such case made and provided, further says, that after the making of said writing obligatory, and while the said Thomas was holding the said office, by virtue of said appointment, recited in said writing, obligatory, to wit: in said district, on the 22d day of July, A. D. 1857, one Henry C. Manning, for and on behalf of George T. Rogers, and for the purpose of obtaining out of said district court another writ of replevin in favor of said Rogers, as plaintiff, against Henry W. Remington and John T. Martin, jun'r, defendants, to replevy certain other lumber, made, subscribed, and swore to his certain affidavit in writing, according to law, wherein he on oath stated that the said Rogers was then the owner of a quantity of lumber, consisting of about three hundred and seventy-five thousand feet, composed of boards, plank, siding and joist, then lying and being at the yard in Prairie du Chien, then formerly occupied by H. C. Manning & Co., and being the lumber sold by said Manning (said affiant) and his partner to the said Rogers, and that the said property was wrongfully detained by the said Remington, and the said Martin, from the said Rogers; that the alleged cause of said detention was a pretended purchase, or negotiation for a purchase, by said Remington & Martin, or one of them, from the said H. C. Manning, while he was the owner thereof, but which purchase was never consummated; that the said property had not been taken for a tax assessment or a fine pursuant to a statute, nor seized under an attachment, or execution against the property of the said Rogers, and that the said property was worth from 8,000 to 10,000 dollars; and that the said

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Manning, for and on behalf of said Rogers, thereafter, to wit, on the 23d day of July, 1857, at the city of Milwaukee, aforesaid, exhibited his said Manning's affidavit in the office of the clerk of said court, and that thereafter, to wit, on the day and year last aforesaid, the said Rogers sued and prosecuted out of said court a certain other writ of replevin in favor of him, said Rogers, as plaintiff, and against said Remington & Martin, as defendants, which said writ was, in due form of law, sealed with the seal of said court, tested in the name of the judge of said court, signed by the clerk of said court, and directed to the marshal of the district of Wisconsin, and which said writ recited that said Rogers complained that said Remington & Martin did unjustly detain from him, said Rogers, a quantity of lumber, consisting of about three hundred and seventy-five thousand feet, composed of boards, planks, siding and joist, and commanded said marshal that if the said Rogers should give him security, as required by law, to prosecute his, said Rogers's, said complaint, and to return the said goods and chattels, said lumber, if return thereof should be adjudged, and to pay all such sums of money as might be recovered against him thereupon, that then the said marshal should cause the said goods and chattels, said lumber, to be replevied and delivered to the said Rogers without delay, and also that he should summon the said Remington and the said Martin to appear before the judge of said court, at Milwaukee, on the 1st Monday of August then next, to answer
18 the said Rogers in the premises. The plaintiff further says, that afterwards, to wit, on the 27th day of July, 1857, the said Rogers caused said affidavit, and said writ of replevin, to be delivered to the said Thomas, who then was holding and exercising the said office of marshal, under and by virtue of said appointment, and that afterwards, to wit, on the 27th day of July, A. D. 1857, the said Rogers caused security, as required by law, to be given to said Thomas, marshal, as aforesaid, in the sum and to the amount of twenty thousand dollars, by bond or writing obligatory of the said Manning and one Ralph Cheney, conditioned, as required by law, that if the said Rogers should prosecute his said action, and should return said lumber to said Remington and Martin, if return thereof should be adjudged, and pay such sum as might for any cause be adjudged against him, said Rogers, in said action, that then said bond should be void and otherwise of force, and that said Thomas, as marshal as aforesaid, then and there received said bond with said writ and affidavit, upon which said bond said Manning and said Cheney had made and subscribed their respective affidavits, wherein they did each swear that they were each worth the sum of twenty thousand dollars over and above all their debts, and exclusive of property exempt from execution, and that the said Thomas then and there, as marshal as aforesaid, endorsed upon said bond his approval thereof. And the plaintiff avers that it then and there became, and then and there was, the duty of the said Thomas, as marshal as aforesaid, in pursuance of the command and exigency of said writ, to take, replevy, and deliver possession of said lumber to said Rogers, according to law, and
19 that afterwards, to wit, on the 27th day of July, A. D. 1857, the

said Thomas, having in his possession as marshal, as aforesaid, the said affidavit, said security, and said writ of replevin, he, said Thomas, at Prairie du Chien, in said district, under and by virtue of said writ, seized, replevied, and took all of said lumber, as he was by said writ commanded, which lumber was then and there the property of the said Rogers, and of great value, to wit, of the value of ten thousand dollars. And the plaintiff avers that said Rogers did then and there, while said Thomas held possession of said lumber, as aforesaid, demand of said Thomas that he should then and there deliver possession of said lumber to him, said Rogers, to wit, at Prairie du Chien, in said district.

And the plaintiff avers that it then and there became, and was, the duty of the said Thomas, as marshal as aforesaid, to deliver said lumber to said Rogers, but that the said Thomas, neglecting and disregarding his duty in the premises, then and there neglected and refused so to deliver the same to said Rogers, but converted the same to his own use, the same being then and there the property of the said Rogers, and of great value, to the value of ten thousand dollars, by means of which said several premises the said writing obligatory became forfeited, and the said Rogers hath sustained damage to a large amount, to wit, the sum of twenty thousand dollars, and thereby an action hath accrued to the said plaintiff, to demand, and have, of, and from the said defendants the said sum of twenty thousand dollars above demanded, yet the said defendants (although often requested so to do) have not as yet paid the said sum of twenty thousand dollars above demanded, or any part thereof, to the said plaintiff, but have hitherto wholly neglected and refused, and still do neglect and refuse so to do, to the damage of the said plaintiff of twenty thousand dollars, and therefore the plaintiff brings this suit, &c.

CARPENTER & GRIDLEY,
Att'ys for Plaintiff.

Rule to plead.

And on the same day of filing said declaration, being the first Monday of August, A. D. 1861, the plaintiffs, by their attorneys, entered in the order and rule book a rule to plead, as follows:

THE UNITED STATES OF AMERICA, to the use of GEORGE T. ROGERS, *vs.* EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, and ROBERT A. BAKER, survivors of Major J. Thomas, deceased.	Of the first Monday of August, A. D. 1861.

On motion of Carpenter & Gridley, plaintiffs' attorneys, ordered that the defendants plead to the plaintiffs' declaration on file, by the first Monday of September next, or their default will be entered.

CARPENTER & GRIDLEY,
Plaintiffs' Attorneys.

September 21, 1861, this day came the defendants, by their attorneys, Messrs. Finches, Lynde & Miller, and filed their pleas.

October 7, 1861, this day came the plaintiffs, by their attorneys, and filed their replication and demurrer.

November 25, 1861, this day came the defendants, by their attorneys, and filed their rejoinder.

21 And afterwards, to wit, at a special term of said court begun and held on the third Monday of April, A. D. 1862, and on the fifth day thereof, to wit, on the twenty-fifth day of April, A. D. 1862, the following proceeding were had, to wit:

Suggestion of death of George T. Rogers.

UNITED STATES OF AMERICA, for the use of GEORGE T. ROGERS,
vs.
EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, and ROBERT A. BAKER, survivors of Major J. Thomas, deceased.
} At law.

This day came the plaintiffs, by their counsel, and made suggestion of the death of George T. Rogers, for whose use this suit is brought; and came Fanny B. Rogers, administratrix, and James H. Rogers, administrator of said deceased, and became party plaintiffs, and on their motion it is ordered by the court that they have leave to prosecute this cause.

And same day letters of administration were filed, as follows:

Letters of administration.

The people of the State of New York to Fanny B. Rogers, the widow of George T. Rogers, deceased, and to James H. Rogers, jointly, both of the city of New York, send greeting:

Whereas, said George T. Rogers, lately departed this life intestate, being at, or immediately previous to, his death an inhabitant of the county of New York, by means whereof, the ordering and granting administration of all and singular, the goods, chattels, and credits, whereof the said intestate died possessed, in the State of New York,

22 and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us; and we being desirous that the goods, chattels, and credits of the said intestate may be well and faithfully administered, applied and disposed of, do grant unto you, the said Fanny B. Rogers and James H. Rogers, full power by these presents to administer and faithfully dispose of all and singular the said goods, chattels, and credits; to ask, demand, recover and receive the debts which unto the said intestate whilst living and at the time of his death did belong; and to pay the debts which the said intestate did owe, as far as such goods, chattels, and credits will thereunto extend and the law require; hereby requiring

you to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate within a reasonable time, and return a duplicate thereof to our surrogate of the county of New York within three months from the date of these presents; and if further personal property or assets of any kind not mentioned in any inventory that shall have been so made shall come to your possession or knowledge, to make or cause to be made, in like manner, a true and perfect inventory thereof, and return the same within two months after the discovery thereof, and also to render a just and true account of administration when thereunto required; and we do by these presents depute, constitute, and appoint you, the said Fanny B. Rogers and James H. Rogers, administratrix and administrator of all and singular the goods, chattels, and credits of the said George T. Rogers, deceased.

23 In testimony whereof we have caused the seal of office of the surrogate of said county to be hereto affixed; witness
[L. S.] Edward C. West, surrogate of said county, at the city of New York, the seventeenth day of March, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-sixth.

EDW. C. WEST, *Surrogate.*

STATE AND COUNTY OF NEW YORK,
Surrogate's Office, ss:

I, Edward C. West, surrogate of said county, and acting as clerk of the surrogate's court, do hereby certify that I have compared the foregoing copy of letters of administration granted to Fanny B. Rogers and James H. Rogers, jointly on the goods, &c., of George T. Rogers, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed my seal of office, this tenth day of April, in the year of our Lord
[SEAL.] one thousand eight hundred and sixty-two, and of our independence the eighty-sixth.

EDW. C. WEST, *Surrogate.*

STATE AND COUNTY OF NEW YORK,
Surrogate's Court, ss:

I, Edward C. West, surrogate of said county, and presiding magistrate of the surrogate's court, do hereby certify that the foregoing exemplification of letters of administration granted to Fanny B. Rogers and James H. Rogers, jointly on the goods, &c., of

24 George T. Rogers. deceased, is authenticated in due form.

In testimony whereof I have hereunto set my hand, and affixed the seal of the surrogate's court, this tenth day of
[SEAL.] April, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-sixth.

EDW. C. WEST, *Surrogate.*

And afterwards, to wit, on the tenth day of said April term, to wit, on the fifth day of May, A. D. 1862, the following proceedings were had, to wit:

UNITED STATES OF AMERICA, for the use of FANNY B. ROGERS, administratrix, and JAMES H. ROGERS, administrator of George T. Rogers, dec'd, *vs.* EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, and ROBERT A. BAKER, survivors of Major J. Thomas, dec'd.	At law.

This day came the defendants, by their counsel, and by leave of the court, withdrew their pleas, and filed a plea of the general issue with notice, which plea and notice are as follows:

Plea.

EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, and ROBERT A. BAKER, survivors of Major J. Thomas, deceased, *ads.* UNITED STATES OF AMERICA, to the use of FANNY B. ROGERS, administratrix, and JAMES H. ROGERS, administrator of the estate of George T. Rogers, deceased.	U. S. district court for Wisconsin.

And the said defendants, by Finches, Lynde, and Miller, their attorneys, come and defend the wrong and injury, when, &c., and say that the said supposed writing obligatory is not their deed, and of this they put themselves upon the country, &c.

FINCHES, LYNDE, & MILLER.
Def'ts' Att'ys.

Notice.

SIRS: Please take notice that the said defendants, at the trial of the above cause, will insist upon and give in evidence, under the general issue above pleaded, that always after the sealing and making of said writing obligatory, to the day of the commencement of this action, they have fulfilled, performed, and kept all and singular the covenants, agreements, and conditions on their part to be fulfilled, performed, and kept according to the form and effect of said writing obligatory. And also that the said writ of replevin, in the plaintiff's declaration mentioned, directed to the marshal of the district of Wisconsin, was placed in the hands of one Francis D. Fuller, the duly qualified deputy of the said Thomas, residing in the city of Madison, in the district of Wisconsin, for service. And the said Francis D.

Fuller seized, replevied, and took possession of all the property mentioned in said writ, as by said writ commanded to do; and while said deputy marshal had said property in custody, by virtue of said writ of replevin, and before the expiration of three days from the time the said property was so taken upon the said writ, the defendants in said replevin suit, Henry W. Remington and John T. Martin, jr., not having excepted to the sureties of the said plaintiff in said replevin suit, did demand the return of the property so taken
26 by said deputy marshal, by virtue of said writ of replevin, as aforesaid, and at the same time presented to said deputy marshal a written bond or undertaking, executed by said Henry W. Remington, as principal, and John T. Martin, senior, and John Keefe, as sureties; that said sureties made oath that they were each worth the sum of twenty thousand dollars over and above all debts, set-offs, and exemptions, that being double the amount mentioned in the affidavit of said Manning as the value of the property in said replevin suit; and that the said deputy marshal, under the advice and direction of ——— Hopkins, attorney for said plaintiff in said replevin suit, refused to accept the said bond or undertaking, until the said Remington should procure the name of one Andrew Proudfit to said bond or undertaking, and until the name of the said Remington was taken off from the said bond, and that said Hopkins, attorney for said plaintiff in said replevin suit, assured the said deputy marshal that with said changes in said bond, he, the said Hopkins, would accept said bond; that the said Remington procured the name of the said Andrew Proudfit to said bond, and erased therefrom his own name, and delivered the same to the said deputy marshal; and thereupon the said Francis D. Fuller, deputy marshal as aforesaid, to wit: on the 29th day of July, 1857, at Madison, in the district of Wisconsin aforesaid, approved of the said bond, and delivered the said property to said defendants in said replevin suit, in pursuance of the advice and direction of the said ——— Hopkins, the attorney for the said
27 plaintiff in said replevin suit, and without the knowledge or consent of the said Thomas, or of these defendants, or any of them. And also that the said bond or undertaking so received by the said deputy marshal, on the delivery of the said property to the defendants in said replevin suit, was accepted by the said George T. Rogers, plaintiff in said suit, and an action brought thereon for the use of the said Rogers, under and by direction of the said Rogers, in the district court of the United States for the district of Wisconsin, and prosecuted by the said Rogers to final judgment, without any notice to the said Thomas, or these defendants, or any or either of them, that said bond or undertaking was not entirely satisfactory. Also, that at the time said bond or undertaking was so received by the said deputy marshal, to wit, on or about the 29th day of July, A. D. 1857, the said Major J. Thomas was solvent and able to pay any and all sums of money which might be due from him in his official capacity; and also any damage or damages arising from his official acts, or the act of his said deputy, and would have paid the same and idemnified these defendants, if payment had then been required by suit or other-

wise; that the said plaintiff did not notify these defendants that he claimed any damages against the said marshal, or any right of action on his official bond, until after the death of the said Major J. Thomas, and his estate had been fully administered upon, and the time for proving up claims against his estate had expired by limitation
28 of the statute; and these defendants have lost all right of action, and all possibility of indemnity for any sum which might be recovered against them in the premises.

FINCHES, LYNDE & MILLER,
Def'ts' Att'ys.

And now at this same term, to wit, April term, 1862, and on the twenty-fourth day thereof, to wit, on the fifth day of June, A. D. 1862, the following proceedings were had, to wit:

Trial.

UNITED STATES OF AMERICA, for the use of FANNY B. ROGERS, administratrix, and JAMES H. ROGERS, administrator, of Geoge T. Rogers, dec'd, *vs.* EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, & ROBERT A. BAKER, survivors of Major J. Thomas, dec'd.	At law.

This day came the parties by their counsel, and, by consent, the issue herein came on to be tried, whereupon a jury was called to try the same, who came, to wit: Edwin Townsend, George Bowman, William J. Whaling, Nelson Webster, James Murray, Justus Kirby, E. S. Hoyt, Samuel Hoyt, Horace Belden, J. F. Birchard, William Brown, jr., and Henry C. West, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled; and the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the twenty-fifth day of said term,
29 to wit, on the sixth day of June, A. D. 1862, the following proceedings were had, to wit:

Verdict.

UNITED STATES OF AMERICA, for the use of FANNY B. ROGERS, administratrix, and JAMES H. ROGERS, administrator, of George T. Rogers, dec'd, *vs.* EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, & ROBERT A. BAKER, survivors of Majoa J. Thomas, dec'd.	At law.

This day came the parties by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid,

being charged by the court on their said oaths respectively, do find that the bond declared on is the deed of the defendants, but that the condition thereof is not broken in manner and form as the plaintiffs have herein declared.

And afterwards, to wit, on the twenty-eighth day of said term, to wit, on the tenth day of June, A. D. 1862, the following proceedings were had, to wit:

Judgment.

UNITED STATES OF AMERICA, for the use of FANNY B. ROGERS, administratrix, and JAMES H. ROGERS, administrator, of GEORGE T. ROGERS, dec'd,
vs.
EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, & ROBERT A. BAKER, survivors of MAJOR J. THOMAS, dec'd. } At law.

This day came the defendants by their counsel, and on their motion it is considered and adjudged by this court now here that the plaintiffs take nothing by their writ, and that the defendants
30 do have and recover of Fanny B. Rogers, administratrix, and James H. Rogers, administrator, of George T. Rogers, deceased, for whose use this suit is prosecuted, fifty-six dollars and thirty cents, their costs about their said defense in this behalf by them expended, and that they have execution therefor.

Judgment roll signed June 10th, A. D. 1862.

Costs, $56 30.

J. M. MILLER, *Clerk.*

Judgment roll filed June 10th, A. D. 1862, at 5 o'clock p. m.

J. M. MILLER, *Clerk.*

And afterwards, to wit, on the 19th day of August, A. D. 1862, bill of exceptions signed and filed, as follows:

Bill of exceptions.

In the district court of the United States for the district of Wisconsin.

UNITED STATES OF AMERICA, to the use of FANNY B. ROGERS, administratrix, and JAMES H. ROGERS, administrator, of GEORGE T. ROGERS, dec'd,
vs.
EDGAR CONKLIN, JAMES EWEN, JOHN B. WILBOR, BENJAMIN F. MOORE, & ROBERT A. BAKER, survivors of MAJOR J. THOMAS, deceased.

Be it remembered, that afterwards, to wit, on the 5th day of June, A. D. 1862, the issue joined in the above-entitled cause came on to

be tried, and a jury being ordered, came twelve good and lawful men of the district to try the same, who were duly empanneled and sworn. And the said trial proceeded in the presence of the said parties and their attorneys, before the honorable Andrew G. Miller, the
31 judge of said court, according to the course and practice of said court.

The plaintiffs, to sustain the issue on their part, read in evidence to the jury the official bond of Major J. Thomas, as marshal, and of the defendants as his sureties, to the effect as set out in the declaration, a copy of which said bond is hereto annexed as part of this bill.

The plaintiffs, further to sustain the issue on their part, offered and read in evidence to the jury the record and judgment roll and writ, with the bonds as returned therewith, remaining of record in this court, in the action of replevin wherein George T. Rogers was plaintiff, and Henry W. Remington and John T. Martin, jun'r, were defendants, being the same suit and proceeding set forth in the declaration, and a transcript of which is hereto annexed as part of this bill.

The plaintiffs, further to sustain this issue, called as a witness Francis D. Fuller, who was sworn, and testified that in the month of July, 1857, he was the deputy of Major J. Thomas, the marshal of the district; that he was the deputy who served the writ of replevin in the case of Rogers *v.* Remington and Martin. Thomas died in the fall of 1859. The property replevined was returned to the defendants in the replevin, and no paper was taken from them, but this paper annexed to the judgment roll. When the bond was first brought to me it was signed by H. W. Remington. When it was last brought to me it was signed by Remington, Martin, Keefe, and Proudfit. H. W. Remington erased his name in my presence. The three last named were not present when the erasure was made. After the erasure was made the bond was taken and the property released. After the erasure was made and the property released
32 the sureties were not informed of the erasure. The erasure was made in all the places where it now appears to be erased. After I knew the erasure was made, I approved the bond and released the property in the replevin. No one was present when the erasure was made but myself, my clerk, and Remington.

Being cross-examined, the witness stated: The next day but one after I took the lumber, Remington came to me and enquired the form of a bond. I gave him a form and he took it, and the next day he brought a bond signed by himself and Martin, sen'r. I took the bond and went to Mr. Hopkins's office, who was attorney for the plaintiff in the replevin. He looked at it, and said he would not have Remington on the bond at all. I took the bond back to Remington and told him what Hopkins said. He, Remington, took the bond and went. The next day he returned the bond with the name of John Keefe on it. I took the bond to Hopkins, who said he did not know anything about Keefe, but if I would get L J. Farwell, William Ripley, or Andrew Proudfit's name on the bond, to take it. I told so

to Remington. who took the bond again. The next morning he brought it to me with Proudfit's name on it. I said to Remington, I could not receive the bond; your name is on it. He said he would take his name off, and I said that would be in accordance with my instructions by Hopkins. I handed the bond back to Remington. He went to the desk and brought it back to me in its present shape. I then accepted the bond, and gave him an order for the lumber.

Defendant's counsel here asked the witness this question:

What did Mr. Hopkins afterward say about the bond?

To this question the plaintiff's counsel objected, and the
33 court overruled the objection and decided that the question should be answered. To which decision the plaintiffs by their counsel then and there excepted, according to the course and practice of this court.

The witness answered: Mr. Hopkins told me afterwards, probably a month afterwards, that it was not necessary to have Remington's name on it; that he was then mistaken in the code. He thought it was the same as the New York code. He said the New York code did not require the defendant's name in the case to be on the bond, and the code of this State did require the name to be on the bond. He gave that as a reason why he would not have Remington's name on the bond. Hopkins was the attorney. The marshal, Thomas, did not know anything about the transaction. The bond was executed at Madison; and he was not at Madison during the time. I was acting under the directions of Mr. Hopkins, the attorney of the plaintiff, who had charge of the whole thing. He had not given me other instructions than those testified to.

The plaintiffs called J. C. Hopkins, esq., as a witness, who was sworn, and he testified as follows:

I was the attorney for the plaintiff in the replevin case. After the marshal reported to me he had taken the property, he came to me with a bond signed by Remington and Martin, sen., and I think Keefe. I took the bond and looked at it, and told him the statute required the bond to be signed by sureties, and I did not want Remington's name on the bond. I served exceptions to the sufficiency of the sureties. I think the marshal and Remington came together. I told him I wanted good sureties, and if he would get Farwell, Ripley, or Proudfit, in addition to the name he already had, I would be satisfied.

They went away, and I had no further conversation with the
34 marshal or Remington on the subject. I have stated all that was said previous to the delivery of the property to the defendants in the replevin. I have no recollection of any subsequent conversation with Fuller. The statutes are the same; and I looked at both statutes and the decisions. I was the attorney of the plaintiff. I was the attorney also for the plaintiff in the suit on the bond. When the bond was accepted by the marshal and the property delivered I had no notice or knowledge of the erasure in the bond. I never saw the bond until the night before the trial of the replevin suit in Milwaukee; never heard of the erasure until that evening.

Henry Remington, the defendant, was insolvent when the suit was brought, and has been ever since.

The defendants then read in evidence the record of a judgment and proceedings in this court in favor of George T. Rogers *v.* Martin, Keeffe & Proudfit, on the said bond, a transcript of which is hereto annexed as part of this bill, to show that the said suit was commenced by said Rogers on said bond after he, the said Rogers, and his attorney, Hopkins, knew of the erasures in said bond.

The evidence being concluded, the court charged the jury, "that if the deputy marshal in the execution of the writ of replevin was in the due service of the writ in taking the bond on the part of the defendants to retain the property, and the altered bond was accepted by the deputy marshal in pursuance of instructions or the interference of the attorney of the plaintiff, then these defendants are not to be held liable.

35 The bond given to the deputy in the first instance, with the name of Remington on it as principal, was valid so far as it related to his being a party or obligor on said bond. It is for the jury to determine whether the erasure was made in consequence of the interference of Mr. Hopkins, the attorney.

The interference or consent of the plaintiff's counsel may be inferred in part from the fact of his afterwards acting on the bond as valid, and bringing suit thereon.

To which said instructions and charge to the jury the plaintiffs by their counsel then and there, in open court, did except, according to the course of practice of this court.

And as none of these matters appear of record, the judge of this court has signed and sealed this bill of exceptions, and ordered that the same be filed.

A. G. MILLER. [SEAL.]

Bond of M. J. Thomas, as marshal.

And said marshal's bond, referred to in said bill of exceptions, is as follows:

Know all men by these presents that we, Major J. Thomas, of Fond du Lac, in the county of Fond du Lac and State of Wisconsin, as principal, and Edgar Conklin, of Brown county, and James Ewen, John B. Wilbor, Benjamin F. Moore, and Robert A. Baker, all of Fond du Lac county and all residents in the State of Wisconsin, as sureties, are held and firmly bound unto the United States of America in the just and full sum of twenty thousand dollars lawful money of the United States, to be paid to the said United States of America, to which payment, well and truly to be made, we do bind our-

36 selves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this fifteenth day of June, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas the President of the United States hath appointed the said Major J. Thomas marshal of the United States for the district

of Wisconsin, to have and to hold the said office, with all the powers, privileges, and emoluments thereunto legally appertaining, during the pleasure of the President of the United States for the time being, and until the end of the next session of the Senate of the United States, and no longer, as in and by a commission, under the hands of the said President and the Secretary of State, and the seal of the United States, bearing date the fourteenth day of May, in the year of our Lord one thousand eight hundred and fifty-seven, more fully appears, now, therefore, the condition of this obligation is such, that if the said Major J. Thomas has truly and faithfully executed and discharged, and shall faithfully perform, execute, and discharge, by himself and by his deputies, all and singular the duties of the said office of marshal according to law, then this obligation to be void and of none effect; otherwise to be and remain in full force and virtue.

MAJOR J. THOMAS. [SEAL.]
EDGAR CONKLIN. [SEAL.]
JAMES EWEN. [SEAL.]
JOHN B. WILBOR. [SEAL.]
BENJAMIN F. MOORE. [SEAL.]
ROBERT A. BAKER. [SEAL.]

Sealed and delivered in presence of—
ANDREW G. MILLER.
JOHN L. HATHAWAY.

37 DISTRICT OF WISCONSIN, *ss:*

The form of the within bond is approved this fifteenth day of June, A. D. 1857.

D. A. J. UPHAM,
U. S. Dis. Att'y.

DISTRICT OF WISCONSIN, *ss:*

Upon evidence furnished me which is satisfactory, I approve the sureties to the within bond as sufficient for the amount thereof, and order the same to be filed and recorded. I also certify that said sureties are freeholders and inhabitants of this district.

June 18th, 1857.

A. G. MILLER,
District Judge, U. S.

June 18, 1857.—Filed and recorded on page 404 of journal "C," of the district court U. S., Wisconsin.

J. L. HATHAWAY, *Clerk.*

And which said transcript of record in the suit of George T. Rogers *vs.* Henry W. Remington and John T. Martin, jr., referred to in the bill of exceptions, is as follows:

38 *Præcipe.*

District court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a special term of the district court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the third Monday (being the nineteenth day) of April, A. D. 1858—present, the honorable Andrew G. Miller, judge of said court, presiding; Major J. Thomas, marshal; John M. Miller, clerk; among other, the following proceedings were had, to wit:

GEORGE T. ROGERS, plaintiff,
vs.
HENRY W. REMINGTON and JOHN T. MARTIN, JR., defendants. } At law.

Be it remembered that heretofore, to wit, on the 23rd day of July, A. D. 1857, came the above-named plaintiff, by his attorney, Mr. Hopkins, and filed his præcipe for a writ of replevin against the above-named defendants, as follows:

District court of the U. S. for the district of Wisconsin.

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON and JOHN T. MARTIN, JR.

Please issue writ of replevin in this case commanding the replevying the property mentioned in the affidavit herewith sent to you to file, returnable at the next rule day, to be issued according to the rules and practice of your court.

Dated July 22d, 1857.

J. C. HOPKINS, *Att'y for Pl'ff.*

Which said affidavit is as follows:

39 *Affidavit for replevin.*

District court of the U. States.

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON and JOHN T. MARTIN, JR.

DISTRICT OF WISCONSIN, *ss:*

Henry C. Manning, of the city of Madison, Dane county, in said district, being duly sworn, says he makes this affidavit for and on behalf of George T. Rogers, a citizen and resident of the State of New York, and for the purpose of replevying certain lumber hereinafter

mentioned. And deponent further says he has personal knowledge of the matters hereinafter stated. And deponent further says that the plaintiff above named, George T. Rogers, is the owner of the property to recover the possession of which this action is brought, and that the description of said property is as follows, to wit: a quantity of lumber consisting of about three hundred and seventy-five thousand feet, composed of boards, planks, siding, and joice, lying and being in the yard at Prairie du Chien, formerly occupied by H. C. Manning & Co., and being the lumber sold by said H. C. Manning, this deponent, and his partner, to the said plaintiff; that the said property is wrongfully detained by the said defendants above named from the said plaintiff; that the alleged cause of detention thereof is a pretended purchase or negotiation for a purchase by defendants, or one of them, from deponent, while he was the owner, but which purchase was never consummated. That the said property has not been taken for a tax assessment or a fine pursuant to a statute, or seized under an attachment or execution against the property of the said plaintiff, and that the property is worth, in the opinion of deponent, from eight to ten thousand dollars.

H. C. MANNING.

Sworn to before me this 22d day of July, 1857.

R. A. VILAS,
Notary Public, Dane County, Wis.

Whereupon a writ issued as follows:

40 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

[SEAL.] Whereas George T. Rogers complains that Henry W. Remington and John T. Martin, jr., do unjustly detain from him a quantity of lumber, consisting of about three hundred and seventy-five thousand feet, composed of boards, planks, siding, and joice:

Therefore, you are hereby commanded that if the said George T. Rogers shall give you security as required by law to prosecute his said complaint and to return the aforesaid goods and chattels if return thereof shall be adjudged, and to pay all such sums of money as may be recovered against him hereupon, that you cause the same goods and chattels to be replevied and delivered to the said George T. Rogers without delay; and also that you summon the said Henry W. Remington and John T. Martin, jr., to appear before the judge of the district court of the United States of America for the district of Wisconsin, at Milwaukee, on the first Monday of August next, if to be found in your district, to answer the said George T. Rogers in the premises.

Witness the honorable Andrew G. Miller, judge of the said district court of the United States, at the city of Milwaukee, in the said dis-

trict of Wisconsin, this twenty-third day of July, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States the eighty-second.

J. C. HOPKINS, *Attorney.*
J. L. HATHAWAY, *Clerk.*

And afterwards, and on or before the return day of said writ, came the said marshal and returned the same with his return endorsed thereon, as follows:

41 *Return.*

"Served on the within-named John T. Martin, jr., by delivering him personally a copy of this writ and affidavit, this 27th day of July, 1857. Served on the within-named H. W. Remington by leaving a copy of this writ and affidavit at his usual place of abode, he not being found, this 28th day of July, 1857. I do hereby certify that the plaintiffs delivered me the annexed bond and return; that I took the within specified goods and chattels in order to make delivery to the plaintiff, within named, but before such delivery was made the defendants in the within-entitled action required a return thereof to them, and gave a within bond executed by three sureties, hereto annexed.

"M. J. THOMAS, *Marshal,*
"By F. D. FULLER, *Deputy.*"

Fees, $60 00.

Which said plaintiff's bond referred to above is as follows:

Plaintiff's bond.

Know all men by these presents that we, H. C. Manning and Ralph Cheney, are held and firmly bound unto Major J. Thomas, marshal of the United States for the Wisconsin district, in the sum of twenty thousand dollars, to be paid to the said marshal or his assigns, to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and each and every of us and them, firmly by these presents.

Sealed with our seals the 25th day of July, in the year of our Lord one thousand eight hundred and fifty-seven.

Whereas a writ of replevin hath been issued out of the district court for the Wisconsin district against Henry W. Remington and John T. Martin, jr., at the suit of George T. Rogers, now, therefore, the condition of this obligation is such that if the said
42 plaintiff shall prosecute the action and shall return the property to the defendant, if return thereof be adjudged, and shall pay to him such sum as may for any cause be recovered against the plaintiff, then this obligation to be void else valid.

H. C. MANNING. [SEAL.]
RALPH CHENEY. [SEAL.]

Witness:
FRANK H. FIRMIN.

DISTRICT OF WISCONSIN, *ss:*

H. C. Manning & Ralph Cheney, being duly sworn, do say that they are each worth the sum of twenty thousand dollars, exclusive of property exempt from execution and their debts.

H. C. MANNING.
RALPH CHENEY.

Subscribed and sworn to before me this 25th day of July, A. D. 1857.

DANIEL R. COIT,
U. S. Court Commissioner, Dist. of Wisconsin.

Endorsed as follows: Approved.

M. J. THOMAS, *Marshal,*
By F. D. FULLER, *Deputy.*

And said bond given by the defendants, referred to in the marshal's return, is as follows:

Defendants' bond.

Know all men by these presents that we [H. W. Remington and] John Keeffe & Andrew Proudfit John T. Martin & are held, *and* firmly bound unto Major J. Thomas, marshal of the United States for the Wisconsin district, in the sum of twenty thousand dollars to be paid to the said marshal or his assigns, to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and each and every of us and them, firmly by these presents.
Sealed with our seals this 29th day of July, A. D. 1857.

43 Whereas the defendants have required the return of property replevied by the marshal at the suit of George T. Rogers against Henry W. Remington and John T. Martin, jr., now, the condition of this obligation is such that if the said defendants in said suit shall deliver to the marshal said property, if such delivery be for any cause, adjudged, and shall pay to him such sum as may, be recovered against the defendants, then this obligation to be void, otherwise valid.

[H. W. REMINGTON.] [SEAL.]
J. T. MARTIN. [SEAL.]
JOHN KEEFFE. [SEAL.]
ANDREW PROUDFIT. [SEAL.]

Witness:
A. B. BRALEY.

DISTRICT OF WISCONSIN, *ss:*

(& John Keeffe)
[H. W. Remington and] John T. Martin, sen., Andrew Proudfit,

being duly sworn, do say that they are each worth the sum of twenty thousand dollars, exclusive of property exempt from execution and their debts.

[H. W. REMINGTON.]
J. T. MARTIN.
JOHN KEEFFE.
ANDREW PROUDFIT.

Subscribed and sworn to before me this 29th day of July, A. D. 1857.

A. B. BRALEY,
Police Justice of the City of Madison.

Endorsed: Approved.

M. J. THOMAS, *Marshal,*
By F. D. FULLER, *Deputy.*

And afterwards, to wit, on the *third* day of August, A. D. 1857, came the said plaintiff, by his said attorney, and filed his declaration as follows:

Declaration.

District court of the United States for the district of Wisconsin.—Of the first Monday of August, A. D. 1857.

DISTRICT OF WISCONSIN, *ss:*

Henry W. Remington and John T. Martin, jr., citizens and residents of the State of Wisconsin, defendants in this suit, were
44 summoned to answer George T. Rogers, a citizen and resident of the State of New York, plaintiff in this suit, of a plea whereof they unjustly detain certain goods and chattels, the property of the said plaintiff, described in the writ of replevin and affidavit annexed in this cause, and hereinafter set forth; and thereupon the said plaintiff, by J. C. Hopkins, his attorney, complains for that the said defendants, on the fifteenth day of July, in the year of our Lord one thousand eight hundred and fifty-seven, at Prairie du Chien, in said State of Wisconsin, became possessed of certain property of him, the said plaintiff, to wit, about three hundred and seventy-five thousand feet of lumber, composed of boards, plank, siding, and joice, the same then being in the yard formerly occupied by H. C. Manning & Co., at Prairie du Chien aforesaid, the property of him, the said plaintiff, of great value, to wit, of the value of ten thousand dollars, which was to have been delivered to the said plaintiff by the said defendants when requested; and the said defendants, although often requested so to do, to wit, on divers days and times while they so had possession of said property as aforesaid, and before the commence-

ment of this suit, to wit, at the place aforesaid, have not delivered the same to the said plaintiff, but refuse to do so, and wrongfully detain the same property, to the damage of the said plaintiff of twelve thousand dollars. And thereof the said plaintiff brings suit, &c.

J. C. HOPKINS,
Pl'ff's Att'y.

And on same day of filing said declaration, being the first Monday of August, A. D. 1857, the said plaintiff, by his attorney, entered in the order and rule book a rule to plead, as follows:

45 *Rule to plead.*

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON & JOHN T. MARTIN, JR. } Of the 1st Monday of Aug't, 1857.

On motion of J. C. Hopkins, pl'ff's att'y, ordered that the above-named defendants plead to the plaintiff's declaration on file, by the first Monday of September next, or their default will be entered.

J. C. HOPKINS, *Pl'ff's Att'y.*

And afterwards, to wit: on the second day of September, A. D. 1857, came the defendants, by their attorney, Mr. Pinney, and filed their pleas, as follows:

Pleas.

HENRY W. REMINGTON & JOHN T. MARTIN, JR., *ads.* GEORGE T. ROGERS. } District court of the United States for the district of Wisconsin.

And the said defendants, Henry W. Remington & John T. Martin, jr., in this suit, by S. U. Pinney, their attorney, come and defend the wrong and injury, when, &c., and say that they do not detain the said goods, chattels, and property in the said plaintiff's declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them. And of this they, the said defendants, put themselves upon the country, &c.

And for a further plea in this behalf, the said defendants, by leave of the court, here for this purpose, first had and obtained according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said goods,
46 chattels, and property in the said declaration mentioned, at the time when, &c., were the property of one of the said defendants, (to wit: Henry W. Remington,) and not of the said plaintiff, as by the said declaration is above supposed. And this they, the said defendants, are ready to verify.

Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

S. U. PINNEY,
Defendants' Attorney.

I, S. U. Pinney, attorney and counsel for the within named defendants, do hereby certify that, in my opinion, the foregoing special plea is well founded.

Dated August 31st, 1857.

S. U. PINNEY,
Attorney and Counsel for Defendants.

And afterwards, to wit: on the 21st day of September, A. D. 1857, came the plaintiff, by his attorney, and filed his replication, as follows:

Replication.

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON & JOHN T. MARTIN, JR. } District court of the United States for the district of Wisconsin.

And the said plaintiff, as to the said plea of the said defendants secondly above pleaded, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against the said defendants, because he says that the said def't, Remington, at the time mentioned in said declaration, was not the owner of the goods, chattels, and property mentioned in said declaration, or any part thereof, as is alleged in said plea of the said defendants
47 by them secondly pleaded. And this he, the said plaintiff, prays may be enquired of by the country, &c.

J. C. HOPKINS, *Att'y for Pl'ff.*

And afterwards, to wit: at a term of said court began and held on the second Monday of November, A. D. 1857, and on the fourth day thereof, to wit: on the twelfth day of November, A. D. 1857, the following proceedings were had, to wit:

Trial.

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON & JOHN T. MARTIN, JR. } At law.

This day came the plaintiff, by his counsel, and the several issues herein joined came on to be tried. Whereupon a jury was called to try the same, who came, to wit: Hamilton Trowbridge, Alfred Williams, Edward Hasse, George Bowman, Edward Button, William H. Byron, William H. Rowe, Allen Woodruff, James Murray, Edwin Townsend, Silas Chapman, and Daniel Phelps, twelve free, honest, and lawful men of the district, who being severally sworn, empannelled, and charged by the court; and the said jurors of the jury aforesaid, upon their said oaths respectively, do say that the said defendants do detain the goods and chattels and property in the declaration mentioned in manner and form as the said plaintiff hath herein declared against them.

And that the property, goods, and chattels described in the de-

claration is not the property of Henry W. Remington, but is the property of the plaintiff, and that he, the said plaintiff, is entitled to have and recover the same. And they do assess the value of said property, goods, and chattels at nine thousand five hundred
48 dollars, and assess the damages to the plaintiff for the detention of the same at two hundred and twenty-one dollars and sixty-six cents. And it appearing to the court at the trial of the issues, that return of the goods and chattels described in the declaration cannot be made to the plaintiff, it is thereupon considered and adjudged by the court now here that the plaintiff do have and recover of the defendants, Henry W. Remington and John T. Martin, jr., and also against John T. Martin, John Keeffe, and Andrew Proudfit, the sureties in the bond for the retention of the said property, nine thousand five hundred dollars, and also two hundred and twenty-one dollars and sixty-six cents, so as aforesaid assessed by the jury, making in the whole nine thousand seven hundred and twenty-one dollars and sixty-six cents, together with one hundred and twenty-six dollars and sixty-five cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment roll signed November 12th, 1857.

Damages	$9,721 66
Costs	126 65
	$9,848 31

J. M. MILLER, *Clerk.*

Judgment roll filed November 12th, A. D. 1857, at 5 o'clock p. m.
J. M. MILLER, *Clerk.*

Motion to set aside judgment and for new trial.

November 17, 1857.—This day came the defendants, by their counsel, and moved the court to set aside the judgment, and for a new trial, which motion is as follows:

U. S. dist. court.

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON and JOHN T. MARTIN, junior.

49 And now come the defendants, by S. U. Pinney, their attorney, and move the court to set aside the judgment herein, and for a new trial, for the reasons disclosed in the affidavit of said defendant, Remington, herewith filed.

S. U. PINNEY, *Def'ts' Att'y.*

New trial granted.

December 4, 1857.—This day, on consideration of the motion of the defendant for a new trial, and of the arguments of counsel, it is

ordered by the court that a new trial be, and hereby is, granted upon the payment by the defendants of the costs of the plaintiff taxed, and the judgment shall be and remain as security for whatever amount may be finally determined against the defendants.

2d trial.

January 14, 1858.—This day came the parties, by their counsel, and the issue herein joined came on to be tried, whereupon a jury was called to try the same, who came, to wit: William P. Merrill, Charles Warner, Edward O'Neil, Egbert Moseby, John James, John White, Enoch Chase, John Crawford, Edward Button, Orville Smith, Sam'l Gabrielson, and Andrew Mitchell, twelve free, honest, and lawful men of the district, who were severally sworn, empannelled, and charged by the court. And the trial not being concluded, the same was adjourned until to-morrow morning.

January 15, 1858.—This day came the parties, by their counsel, and the trial of the issue herein was resumed. And the said jurors of the jury being charged by the court, retired to their room, under the charge of a sworn officer, to deliberate on their verdict, with consent that they may bring in a sealed verdict.

Verdict.

50 January 16, 1858.—This day came the parties, by their counsel, and the said jurors of the jury came into court with their verdict, and on their oaths respectively do say, that the defendants do detain the goods, and chattels, and property in the declaration mentioned, in manner and form as the said plaintiff hath herein declared against them. And that the lumber, goods, and chattels described in the declaration is not the property of the defendant, Henry W. Remington, but is the property of the plaintiff, and that he, the said plaintiff, is entitled to have and recover the same. And that they find the value of the said lumber, goods, and chattels at seven thousand five hundred dollars, and they do assess the damages to the plaintiff for the detention thereof at two hundred and forty dollars.

Motion for new trial.

And came the defendants, by their counsel, and moved the court for a new trial for reasons filed, as follows:

District court of the United States for the district of Wisconsin.

HENRY W. REMINGTON and JOHN T. MARTIN, jr., *ads.* GEORGE T. ROGERS.

And now, on this sixteenth day of January, A. D. 1858, come the said defendants by their counsel, and move the court for an order setting aside the verdict of the jury herein, and for a new trial, for the reasons following :

That the court erred in his rulings on the trial.

That the court erred in his instructions to the jury, and in refusing to charge them as prayed for by the defendants.

That the defendants were taken by surprise by the ground assumed by the court, in his instructions to the jury as to the competency of the witnesses Henry C. and Louis Manning.

51 That the verdict is against the law and evidence of the case.

LEVI HUBBELL,
N. J. EMMONS,
of Counsel for Defendants.

New trial ordered.

February 2, 1858.—This day came the parties by their counsel, and the motion of the defendants for a new trial was argued. On consideration whereof it is ordered by the court that a new trial be, and is hereby, ordered, the costs to abide the event. The judgment not to be disturbed.

3d trial.

April 30, 1858, this day came the parties, by their counsel, and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit: William Rohn, Francis Conrad, Andrew McCormick, E. L. Phillips, Jonathan Larned, Jacob Hengey, Elisha Starr, Reuben Strong, Thomas Cavenay, William Brown, jr., Priam B. Hill, and Walter S. Hunn, twelve free, honest and lawful men of the district, who were severally sworn and empannelled by the court, and the trial not being concluded the same was adjourned until to-morrow morning.

Verdict.

May 1, 1858, this day the trial of the issue herein was resumed, and the said jurors of the jury, being charged by the court on their said oaths, respectively do say that the defendant, Henry W. Remington, does unlawfully detain the goods and chattels and property in the declaration mentioned and described in manner and form as the said plaintiff hath herein declared against him; and that the said property, goods, and chattels is not the property of the said

52 Henry W. Remington, but is the property of the plaintiff, and that the said plaintiff is entitled to have and recover the same, and they do find the value of the said property at eight thousand seven hundred and fifty dollars, and they do assess the damages for the detention thereof at four hundred and fifty-nine dollars and thirty-eight cents. And the said jury do further find that the defendant, John T. Martin, jr., does not detain the said goods, and chattels, and property, in manner and form as the plaintiff hath herein declared against him.

Motion for new trial.

May 4, 1858, this day came the defendants, by their counsel, and moved the court for a new trial for reasons filed, which motion is as follows:

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON and JOHN T. MARTIN, junior. } District court, United States.

And now come the defendants and move the court to set aside the verdict herein, and to grant a new trial for the reasons that the court committed various misrulings on the trial; that the verdict is against the law and the evidence; that the court erred in his instructions to the jury.

May 1, 1858.

N. J. EMMONS,
LEVI HUBBEL,
For the Def'ts.

May 11, 1858, this day the motion of the defendant, Henry W. Remington, for a new trial came on to be heard and was argued by counsel. On consideration whereof it is ordered by the court that the said motion be and is hereby overruled. And came the plaintiff, by his counsel, and moved the court to enter judgment
53 against the defendant, Henry W. Remington, and also against John T. Martin, senior, John Keefe, and Andrew Proudfit, on the bond given to the marshal on the claim of property by the defendants. To which motion the said John T. Martin, senior, and Andrew Proudfit, by their counsel, objected for the reasons filed. Francis D. Fuller, the deputy marshal, who served the replevin, being examined on oath. And the said motion being argued by counsel, the court held the same under advisement.

Judgment.

And now at this same term, to wit, April term, 1858, and on the sixteenth day thereof, to wit, on the twelfth day of May, A. D. 1858, the following proceedings were had, to wit:

GEORGE T. ROGERS
vs.
HENRY W. REMINGTON and JOHN T. MARTIN, jr. } At law.

This day came the parties, by their counsel, and it appearing to the court that return of the goods and chattels replevied cannot be made to the plaintiff, it is considered and adjudged by this court now here that the plaintiff do have and recover of the defendant, Henry W. Remington, eight thousand seven hundred and fifty dollars, and also four hundred and fifty-nine dollars and thirty-eight cents, so assessed by the jury as the value of the property replevied, and damages for the detention thereof, making in the whole nine thou-

sand two hundred and nine dollars and thirty-eight cents, together with two hundred and fifty-one dollars and twenty-five cents,
54 his costs about his said suit in this behalf by him expended, and that he have execution therefor.

And it is further ordered by the court that the motion for judgment against John T. Martin, senior, John Keefe, and Andrew Proudfit, be and hereby is overruled, the bond not having been delivered to the marshal signed by them as sureties with H. W. Remington, the principal, as required by the statute. This order is without prejudice to the legal rights of the parties in suits at law. And it is further ordered by the court that the judgment heretofore rendered in favor of this plaintiff against John T. Martin, jr., John T. Martin, senior, John Keefe, and Andrew Proudfit, be and hereby is vacated as to them.

Judgment roll signed May 12th, A. D. 1858.

J. M. MILLER, *Clerk.*

Damages	$9,209 38
Costs	251 25
	$9,460 63

Judgment roll filed May 12th, A. D. 1858, at 5 o'clock p. m.

J. M. MILLER, *Clerk.*

And said transcript of record in the suit of the United States for the use of George T. Rogers against John T. Martin, John Keeffe, and Andrew Proudfit, referred to in the bill of exceptions, is as follows:

55 *Præcipe for summons.*

District court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a special term of the district court of the United States of America for the district of Wisconsin, begun and held according to law at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the eighth day) of November, A. D. 1858; present: the honorable Andrew G. Miller, judge of said court, presiding, Major J. Thomas, marshal, John M. Miller, clerk. Among other the following proceedings were had, to wit:

MAJOR J. THOMAS, marshal of the United States for the district of Wisconsin, for the use of GEORGE T. ROGERS, plaintiff,
vs.
JOHN T. MARTIN, JOHN KEEFE, AND ANDREW PROUDFIT, defendants.

Be it remembered that heretofore, to wit, on the 19th day of June, A. D. 1858, came the above-named plaintiff, by his attorneys,

Messrs. Orton, Hopkins and Firmin, and filed his præcipe for a summons against the above-named defendants, as follows:

MAJOR J. THOMAS, marshal of the United States for the district of Wisconsin, for the use of GEORGE T. ROGERS. *vs.* JOHN T. MARTIN, JOHN KEEFE, and ANDREW PROUDFIT.	District court of the United States for the district of Wisconsin.

Please issue summons in debt for $20,000, returnable on the first Monday of July next, in the above-entitled action.

Dated June 18, 1858.

Yours, &c.,

ORTON, HOPKINS & FIRMIN,
Att'ys for Pl'ff.

To J. M. MILLER, esq., *Clerk.*

Whereupon a summons issued as follows.

56 THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

[SEAL.] You are hereby commanded to summon John T. Martin, John Keefe, and Andrew Proudfit, to appear before the district court of the United States of America for the district of Wisconsin, aforesaid, at Madison, on the first Monday of July next ensuing, then and there to answer unto Major J. Thomas, marshal of the United States for the district of Wisconsin, for the use of George T. Rogers, in a plea of debt to his damage twenty thousand dollars, which shall then and there be made to appear, and of this writ make due return.

Witness the hon. Andrew G. Miller, judge of the said district court of the United States, at the city of Milwaukee, in the said district of Wisconsin, this nineteenth day of June, in the year of our Lord one thousand eight hundred and fifty-eight and of the independence of the United States the eighty-second.

ORTON, HOPKINS, & FIRMIN, *Attorneys.*
J. M. MILLER, *Clerk.*

Return.

And afterwards, and on or before the return day of said summons, came the said marshal and returned the same with his return endorsed thereon, as follows:

"Served on the within-named John T. Martin, by showing him this summons and delivering him a copy thereof, this 26th day of June, 1858. Served on the within named Andrew Proudfit, by leav-

ing a copy of this summons at his usual place of abode, this 26th day of June, 1858, he not being found; the within-named John Keefe not found.

"M. J. THOMAS, *Marshal*,
"By F. D. FULLER, *Deputy*.

"Fees, $4 52."

Rule to plead.

And afterwards, to wit, on the seventh day of July, A. D. 1858, came the said plaintiff, by his attorneys, and filed his declaration, and on his motion it is ordered by the court that the defendants plead thereto by the twenty-first day of July instant.

Which declaration is as follows:

57 *Declaration.*

United States district court for the district of Wisconsin.

DISTRICT OF WISCONSIN:

Major J. Thomas, marshal of the United States for the district of Wisconsin, who prosecutes for the benefit of George T. Rogers, a citizen of the State of New York, plaintiff in this suit, by Orton, Hopkins, and Firmin, his attorneys, complains of John T. Martin, Andrew Proudfit, and John Keefe, defendants in this suit, of a plea that the said defendants render unto the said plaintiff the sum of twenty thousand dollars lawful money of the United States, which the said defendants owe to and unjustly detain from the said plaintiff.

For that whereas heretofore, to wit, on the 29th day of July, one thousand eight hundred and fifty-seven, at the city of Madison, in said district, the said defendants, by their certain writing obligatory, sealed with their respective seals, and now to the court now have shown the day whereof is the day and year last aforesaid, acknowledged themselves to be held and firmly bound unto the plaintiff, as marshal of the United States for Wisconsin district, in the sum of twenty thousand dollars, to be paid to the said marshal, or his assigns, to which payment well and truly to be paid the said defendants bound themselves, their heirs, executors, and administrators, jointly and severally firmly by the said writing obligatory, with a condition to the said writing obligatory thereunder written, after reciting that the defendants had required the return of property replevied by the marshal at the suit of George T. Rogers against Henry W. Remington and John T. Martin, jr., that if the said defendants in said suit should deliver to the marshal said property, if such delivery
58 be adjudged, and shall pay to him such sum as may for any cause be recovered against the defendants, then the said writing obligatory should be void, else to remain in full force.

And the said plaintiff in fact saith that said suit of George T. Rogers against Henry W. Remington and John T. Martin, jr., men-

tioned in said writing obligatory, was brought to trial in the district court of the United States for the district of Wisconsin, and by the consideration of said court a judgment therein was recovered in favor of the said George T. Rogers, the plaintiff therein, against the defendant Henry W. Remington, then on the 12th day of May, A. D. 1858, for the value of the property replevied by the marshal and mentioned in said writing obligatory, for the amount of nine thousand two hundred and nine dollars and thirty-eight cents damages, and the said George T. Rogers also, by the consideration and judgment of the said court, recovered against the said Henry W. Remington in said suit the further sum of two hundred and fifty-one dollars and twenty-four cents, for his costs by him about his suit in that behalf expended in and about the prosecution of said suit, whereupon the said Henry W. Remington was convicted, as by the said record and proceedings still remaining in said district court more fully and at large appears.

And the said plaintiff, for a breach of the condition of the said writing obligatory so made and executed as aforesaid, does, according to the form of the statute in such case made and provided, aver and in fact say that the said Henry W. Remington, one of the defendants mentioned in said writing obligatory, hath not paid (although often requested so to do) to the said plaintiff the said sum of nine thousand two hundred and nine dollars and thirty-eight cents, so as aforesaid adjudged to the said George T. Rogers by the said district court
59 of the district of Wisconsin, or any part thereof, nor hath he, the said Henry W. Remington, at any time paid (although often requested so to do) to the said George T. Rogers the said sum of two hundred and fifty-one dollars and twenty-four cents, or any part thereof, so as aforesaid adjudged to the said George T. Rogers by said district court for the district of Wisconsin, for his costs and charges as aforesaid, but so to do he, the said Henry W. Remington, hath wholly neglected and refused, and still doth neglect and refuse; by reason whereof the said writing obligatory became forfeited to the said plaintiff, and the said writing obligatory being so forfeited to the said plaintiff, the said defendants did not pay to the said plaintiff the said sum of money in the said writing obligatory mentioned, or any part thereof, but the said sum of money in the said writing obligatory mentioned still remains due and unpaid.

And the said plaintiff further in fact saith that by reason of the premises, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, as marshal as aforesaid, to have and demand of the said defendants the said sum of money in the said writing obligatory mentioned and hereinabove demanded.

Nevertheless the said defendants (although often requested) have not yet paid the said sum of money above demanded, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff they, the said defendants, have hitherto wholly refused and still do refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore he brings suit, &c.

ORTON, HOPKINS & FIRMIN, *Pl'ff Att'ys.*

Demurrer to declaration.

And afterwards, to wit, on the 20th day of July, A. D. 1858,
60 came the defendants by their attorneys, Messrs Downer, La Due & Jenkins, and Levi Hubbell, and filed their demurrer, as follows:

United States court, district of Wisconsin.

MAJOR J. THOMAS, marshal of the United States for the district of Wisconsin, for the use of GEORGE T. ROGERS,
vs.
JOHN T. MARTIN, JOHN KEEFE and ANDREW PROUDFIT.

And the said John T. Martin, John Keefe and Andrew Proudfit, defendants in this suit, by Downer, La Due & Jenkins and Levi Hubbell, their attorneys, come and defend the wrong and injury, when, &c., and say that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain their aforesaid action thereof against them the said defendants; and they, the said defendants, are not bound by law to answer the same; and this they are ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them.

And the said defendants state and show to the court the following causes of demurrer to the said declaration, that is to say: because it appears in and by the said declaration that the said defendants are charged as sureties, by reason of their having made or executed and delivered to the said plaintiff a certain writing obligatory, denominated a bail bond, in a certain action then pending in the district court of the United States for the district of Wisconsin, called
61 an action of replevin, in which George T. Rogers was plaintiff and Henry W. Remington and John T. Martin, jr., were defendants; in which action the said plaintiff, as marshal of the United States for the said district, by virtue of process in his hands, had levied upon and seized a large quantity of lumber in the possession of the said Henry W. Remington and John T. Martin, jr., and, in and by said writing obligatory, the defendants in this action became bound, as sureties, for the delivery of said lumber to the said plaintiff, as such marshal, if such delivery should be adjudged, and for the payment to him of such sum as might, for any cause be recovered against the said Henry W. Remington and John T. Martin, jr., and not otherwise; and because it further appears in and by the said declaration that the said action of replevin was prosecuted to final judgment in said court, and that the said George T. Rogers, plaintiff, recovered judgment therein against the said Henry W. Remington, one of the

defendants therein, only, and did not recover judgment against the said John T. Martin, jr., the other of said defendants, and that no judgment was recovered by the plaintiff in said action of replevin for any sum of money whatever, against both of the said defendants in said action of replevin; and also, because the said declaration is, in other respects, uncertain, informal and insufficient.

DOWNER, LA DUE & JENKINS &
LEVI HUBBELL, *Def'ts' Att'ys.*

I hereby certify that in my opinion the foregoing demurrer is well founded.

J. DOWNER.

October 5, 1858.—This day came the defendants by their counsel and withdrew their demurrer, and rule on the defendants to
62 plead to the declaration on file in ten days or their default will be entered.

And afterwards, to wit, on the 7th day of October, A. D. 1858, came the defendants by their attorneys, and filed their pleas, as follows:

Pleas.

United States district court in and for the district of Wisconsin.

MAJOR J. THOMAS, marshal, &c.,
for the use of GEORGE T. ROGERS,
against
ANDREW PROUDFIT, JOHN T. MARTIN and JOHN KEEFE.

And now comes the defendant Andrew Proudfit, by L. Hubbell and Downer, La Due & Jenkins, his att'ys, and defends the wrong and injury, when, &c., and says that the writing obligatory in the declaration mentioned is not his act and deed, and of this he puts himself upon the country, &c.

L. HUBBELL.
DOWNER, LA DUE & JENKINS.
Att'ys for def't Proudfit.

And now come the defendants in the above-entitled action by their att'ys, and defend the wrong and injury, when, &c., and say that the said plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that the supposed writing obligatory in said pl'ffs' declaration mentioned is not their act and deed, and of this they put themselves upon the country, &c.

L. HUBBELL.
DOWNER, LA DUE & JENKINS,
Def'ts' Att'ys.

I certify that in my opinion the two foregoing special pleas are well founded.

JAS. M. DOWNER, *one of Def'ts' Att'ys.*

63 And now, at this same term, to wit, November term, 1858, and on the fifth day thereof, to wit, on the twelfth day of November, A. D. 1858, the following proceedings were had, to wit:

Trial.

MAJOR J. THOMAS, marshal of the United States for the district of Wisconsin, for the use of GEORGE T. ROGERS,
vs.
JOHN T. MARTIN, JOHN KEEFE & ANDREW PROUDFIT. } At law.

This day came the parties by their counsel, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: Daniel Quigley, J. M. Kellogg, W. H. Thomas, A. F. Coffren, William E. McClure, William H. Dakin, William H. Prentiss, Thomas Skelton, Haynes French, Peter Sharp, John H. Smith and P. H. Brady, twelve free, honest and lawful men of the district, who were severally sworn and empannelled. And the trial not being concluded, the same was adjourned until nine o'clock to-morrow morning.

Verdict.

And afterwards, to wit, on the sixth day of said term, to wit, on the thirteenth day of November, A. D. 1858, the following other proceedings were had, to wit:

This day came the parties by their counsel and the trial of the issue herein was resumed. And the jurors of the jury aforesaid, being charged by the court on their said oaths, respectively, do say that the defendants do owe and are indebted to the plaintiff twenty thousand dollars, the penalty of the bond declared on, and do assess the damages to the plaintiff at nine thousand seven hundred and eighty-two dollars and ninety-six cents.

64 *Motion in arrest of judgment.*

And afterwards, to wit, on the seventh day of said term, to wit, on the fifteenth day of November, A. D. 1858, the following other proceedings were had, to wit:

This day came the defendants by their counsel and filed their motion in arrest of judgment, as follows:

United States district court in and for the district of Wisconsin.

MAJOR J. THOMAS, use, &c.,
against
ANDREW PROUDFIT and others.

And now come the defendants and move the court to arrest the judgment in this action, because it appears, in and by the declaration

of said plaintiff, that judgment was rendered in the action mentioned in the bond on which this suit is brought against only of the defendants in said action, to wit, Remington, and not against both.

And also for the reason that the issue in this cause is immaterial, and the pleadings and declaration defective and insufficient in law.

J. DOWNER,
Def'ts' Att'y.

Judgment.

And afterwards, to wit, on the thirteenth day of said term, to wit, on the twenty-second day of November, A. D. 1858, the following other proceedings were had, to wit:

This day the motion of the defendants in arrest of judgment was submitted. Whereupon it is ordered by the court that the said motion be and hereby is overruled.

And it is considered and adjudged by this court now here, that the plaintiff do have and recover of the defendants, John T. Martin, John Keefe and Andrew Proudfit, twenty thousand dollars, together with thirty-seven dollars and twelve cents, his costs about his said suit in this behalf by him expended, and that the plaintiff have execution for nine thousand seven hundred and eighty-two dollars and
65 ninety-six cents, the damages so assessed by the jury, together with the said costs.

Judgment roll signed November 22nd, 1858.

J. M. MILLER, *Clerk.*

Damages,	$9,782 96
Costs - -	37 12
	$9,820 08

Judgment roll filed Nov. 22d, A. D. 1858, at five o'clock p. m.

J. M. MILLER, *Clerk.*

And same day bill of exceptions filed.

Writ of error, &c.

December 1, 1858.—This day came the defendants John T. Martin and Andrew Proudfit, and filed their bond to the plaintiff in the penalty of twenty-one thousand dollars, with Stephen D. Carpenter, James M. Dickinson, Thomas L. Lawrence, George Webb, David W. Jones and John H. Lewis, their sureties, conditioned that they shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make good their plea. Said bond and sureties are approved by the court, and it is ordered that execution be superseded and that a writ of error do issue. Writ of error and citation issued and copy of writ of error filed for defendant in error.

Citation returned. District of Wisconsin. E. J. Martin, being duly sworn, says, that he served the within citation on the within named Major J. Thomas on the first day of December, 1858, by

showing to him the same and delivering to him a true copy thereof, also that on the 2nd day of December, 1858, the within citation on J. C. Hopkins, one of the attorneys of record in the action on which the within mentioned judgment was recovered, by showing him this citation and delivering him a true copy thereof.

E. J. MARTIN.

Subscribed and sworn to before me this 3rd day of December, A. D. 1858.

DANIEL R. COIT,
Commissioner U. S. District Court for the District of Wisconsin.

I admit service of a true copy of the within citation this 1st day of Dec., 1858.

M. J. THOMAS, *Marshal.*

Copy served on me this 2d day of Dec., 1858.

J. C. HOPKINS, *Att'y.*

July 16, 1859.—Exemplification of record forwarded to Supreme Court of the United States.

End of bill of exceptions.

66 November 10, 1862.—Substitution of Mat. H. Carpenter as plaintiff's attorney filed.

November 15, 1862.—This day came the plaintiffs and filed the bond of H. C. Manning, James C. Hopkins, Timothy Brown, and J. A. Ellis, in the penalty of five hundred dollars, conditioned that they will prosecute a writ of error to effect and answer all costs if they fail to make good their plea.

Which bond is as follows:

Bond.

Know all men by these presents, that we, H. C. Manning, James C. Hopkins, Timothy Brown, and J. A. Ellis, are held and firmly bound unto Edgar Conklin, James Ewen, John B. Wilbor, Benjamin F. Moore, and Robert A. Baker, survivors of Major J. Thomas, deceased, in the sum of five hundred dollars, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated November 14th, 1862.

Whereas the United States of America, prosecuting to the use of Fanny B. Rogers, administratrix, and James H. Rogers, administrator of George T. Rogers, deceased, has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the suit in favor of the United States of America, prosecuting as above, against the above-named obligees, by the district court of the United States for the district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the

above-named United States, to the use as aforesaid, shall prosecute its said writ of error to effect and answer all costs of it, shall
67 fail to make good its plea, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

H. C. MANNING. [SEAL.]
JAMES C. HOPKINS. [SEAL.]
TIMOTHY BROWN. [SEAL.]
J. A. ELLIS. [SEAL.]

Signed and delivered in presence of—
SIDNEY FOOTE.

Endorsed as follows: Nov. 15, 1862: this bond and sureties approved.

A. G. MILLER, *District Judge.*

Whereupon it is ordered by the district judge that said bond be and hereby is approved, and that a writ of error and citation be issued.

And writ of error and citation issued, and copy of writ of error lodged for defendants in error.

68 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, John M. Miller, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, now on file and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of United States of America, for the use of George T. Rogers, against Edgar Conklin, James Ewen, John B. Wilbor, Benjamin F. Moore, and Robert A. Baker, survivors of Major J. Thomas, deceased.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in
[SEAL.] the said district of Wisconsin, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the said United States the eighty-seventh.

J. M. MILLER, *Clerk.*

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the ren-
[SEAL.] dition of a judgment in a plea which is in the said circuit court of the United States of America for the district of

Wisconsin, before you, between United States of America, for the use of Fanny B. Rogers, administratrix, and James H. Rogers, administrator of George T. Rogers, deceased, plaintiffs, and Edgar Conklin, James Ewen, John B. Wilbor, Benjamin F. Moore, and Robert A. Baker, survivors of Major J. Thomas, deceased, defendants, a manifest error hath happened, to the great damage of the said United States of America, prosecuting for the use of Fanny B. Rogers, administratrix, and James H. Rogers, administrator of George T. Rogers, deceased, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

J. M. MILLER, *Clerk.*

70 UNITED STATES OF AMERICA, *ss:*

To Edgar Conklin, James Ewen, John B. Wilbor, Benjamin F. Moore, and Robert A. Baker, survivors of Major J. Thomas, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Wisconsin, wherein the United States of America, prosecuting for the use of Fanny B. Rogers, administratrix, and James H. Rogers, administrator of George T. Rogers, deceased, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-seventh.

A. G. MILLER,

District judge of the U. S. for the Wisconsin district.

71 U. S. circuit court, Wisconsin.

UNITED STATES OF AMERICA, for use of FANNY B. ROGERS, adm'x, *et al.*, pl'ff in error,
v.
EDGAR CONKLIN *et al.*, def'ts in error.

Citation.

We hereby admit due service of this citation on the defendants therein named this 17th day of November, A. D. 1862.

FINCHES, LYNDE & MILLER,
Att'ys for Def'ts in Error.

Supreme Court of the United States.

No. 178.—December Term, 1863.

The United States of America, to the use of Fanny B. Rogers Administratrix, and James H. Rogers Administrator of George T. Rogers deceased, Plaintiffs in Error,

vs.

Edgar Conklin James Ewen John B. Wilbor Benjamin F. Moore and Robert A. Baker survivors of Major J. Thomas deceased, Defendants in Error.

DEFENDANTS' BRIEF.

Supreme Court of the United States.

No. 178.—December Term, 1863.

The United States of America, to the use of Fanny B. Rogers Administratrix, and James H. Rogers Administrator of George T. Rogers deceased, Plaintiffs in Error,

vs.

Edgar Conklin James Ewen John B. Wilbor Benjamin F. Moore and Robert A. Baker survivors of Major J. Thomas deceased, Defendants in Error.

DEFENDANTS' BRIEF.

This action was brought on a marshal's bond, against his sureties, to recover damages for an alleged wrongful act of a deputy marshal in the execution of a writ of replevin.

The case comes here upon two exceptions found on pages 19 and 20 of printed record.

The first exception is to the ruling of the court on admission of evidence, and is not well taken.

Conklin in his treatise, p. 440, says: "To entitle a party to take an exception to the admission of evidence, whether written or oral, by the court, he must specify the particular ground of his objection to its admission. A mere general objection is insufficient, and will be regarded by the appellate court as nugatory; nor ought objections in this form to be tolerated at the trial."

Taylor on evidence, vol. 2, p. 1,165, lays down the rule as follows:

"When evidence is objected to at the trial, the nature of the objections must be distinctly stated."

In support of the same rule I refer to—

Camden vs. Doremus, 3 How., 530.
Moore vs. The Bank of the Metropolis, 13 Peters, 302.
Clark vs. Conway, 23 Mis., 438.
Mathews vs. La Compte, 24 Mis., 546.
Russell vs. Branham, 8 Blackford, 278.
Carter vs. Hanna, 2 Carter (Ind.), 45.

If the evidence sought to be elicited by the question was admissible for any purpose, the objection was properly overruled.

Hopkins was the attorney of record in the replevin suit. He sued out the writ, placed it in the hands of officer, directed the officer as to its execution, as to what bond the officer should take on the redelivery of the property. The deputy marshal had taken the bond to Hopkins once for his approval. (See folio 32, p. 18, of printed case.) Hopkins looked at it and said he would not have Remington on the bond. Remington was one of the defendants in the replevin suit. (See record of replevin suit, beginning at page 22 of printed case.) The bond was taken to Hopkins the second time for his approval, and he gives directions in regard to it. (p. 18 printed case.)

Can it be contended then that we had no right to ask what Hopkins said when the bond was taken to him the third time, when the deputy supposing that he had complied in the minutest particular with the directions of the attorney, had given an order on his keeper who was in custody of the property at Prairie Du Chien, (see p. 4, 8, and 11 of printed case), (more than a hundred miles from the place where the order was given), to deliver the property to Remington? The deputy could still countermand the order by telegram and retain the property, having had a conversation with Hopkins, if he had disapproved of the bond. Had we not the right, then, to enquire after such conversation?

If so, the objection was properly overruled. The objection is not to the form of the question.

II. The exception to the instructions of the court—p. 20 of printed case.

1. This exception is too general.

In Johnston vs. Jones, 1 Black, 220, this court say: "It is well settled that if a series of propositions be embodied in instructions, and the instructions are excepted to in mass, if any one of the propositions be correct the exception must be overruled.

Hunt vs. Mayber, 3 Sel., 273.
Decker vs. Mathews, 2 Ker, 313.
Caldwell vs. Murphy, 1 Ker, 416.
Jones vs. Osgood, 2 Selden, 235.
Eton vs. Markham, 20 Bar., S. C. R., 346.

The 38th rule of this court, adopted at January term, 1832, directs that thereafter the "judges of the circuit and district courts do not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge, but that the party excepting be required to state distinctly the several matters in law in such charge, to which he excepts, and that such matters of law and those only, be inserted in the bill of exceptions and allowed by the court."

Zeller's Lessees vs. Eckhart, 4 How., 297.
Stimpson vs. Westchester R. R. Co., 4 How., 380.

Is not this a general exception to the whole charge?—(See p. 20 of printed case.)

Is not this a series of propositions embodied in instructions, and excepted to in mass?

II. The instructions were correct in law.

If the error of the officer arose out of or was caused by the interference of plaintiffs' attorney the defendants are not liable.

3 Robinson's Practice, 82.
Crowder vs. Long, 8 Barn. & Cress., 598.
Cook vs. Palmer, 6 Barn. & Cress., 739.
Mickles vs. Hart, 1 Denio, 548.
Acker vs. Ledyard, 8 Bar., 514–517.

Though the deputy deviate from the line of his duty in re-

spect to a *fi. fa.* without special authority, yet if the attorney who issued it subsequently adopt the act, his client cannot hold the sheriff.

Corning vs. Southland, 3 Hill, 552.

In Walters vs. Sykes, 22 Wend., 568, in delivering the opinion of the court, Judge Cowen says: "In short, the result of the cases seems to be that the attorney for the party in whose favor process issues, may give such directions to the sheriff as will not only excuse him from his general duty, but bind him. The attorney may make him, *pro tanto*, a special agent by restricting his general power in any way which shall not amount to an abuse of the process, although he cannot enlarge the power. Both the process and the law which confers authority under it, are for the benefit of the party, and it is a general rule that a man may dispense with an entire law which is intended for his aid or protection."

To the same point—

Corning vs. Southland, 3 Hill, 552.
Gorham vs. Gale, 7 Cow., 737.
Gaillard vs. Smart, 6 Cow., 383.

"The attorney of the plaintiff, without any special authority therefor, may approve of the receipt taken by the officer for personal property attached by him, and thereby relieve him from his obligation to retain and produce the property, that it may be taken in execution."

"He may elect and control the remedy, and all the proceedings arising out of and connected with it, but he cannot release or discharge the cause of action without receiving payment."

"Though the attorney may conduct so indiscreetly, negligently, and ignorantly, or may so abuse his trust as to be answerable to his client in damages, such conduct is not to prejudice the officer who is entitled to regard him as the agent of his client, in all the contingencies which may arise in the prosecution, and all the processes adopted to secure the debt entrusted to his care."

Jenney vs. Delesdernier, 20 Maine, 183.
Pierce vs. Strickland, 2 Story R., 305.

Kimball vs. Perry, 15 Vt., 414.
Dunlap's Paley on Agency, 192, n. 2.
Hopkins vs. Willard, 14 Vt., 474.
Rice vs. Wilkins, 8 Shep., 558.
Edgerton vs. Brocket, 11 New Hamp., 218.
Vail vs. Jackson, 15 Vt., 314.
York Bank vs. Appleton, 5 Shep., 55.
Springer vs. Whipple, 5 Shep., 351.
Simonton vs. Burwell, 21 Wend., 362.
Mathews vs. Ray, 4 Dana, 474.
Keller vs. Scott, 2 Sm. & Mar., 81.
The People vs. Lansborn, 1 Scam., 123.
Clark vs. Kingsland, 1 Sm. & Mar., 248.
Columbus vs. Miller, 7 Watts, 63.
Halbut vs. Montgomery, 5 Dana, 11.
Silmes vs. Ely, 3 Watts & Sarg., 420.

"In defence of the action for a false return of nulla bona, to a writ of execution, the sheriff may show that the plaintiff assented to the return after being informed of the circumstances."

Stuart vs. Whitaker, 2 C. & P., 100.
Beynon vs. Gurnett, 1 C. & P., 154.

Can there be a doubt, then, as to the correctness of the three several propositions contained in the judge's charge, and which are excepted to in mass.

The first of which is—

"That if the deputy-marshal, in the execution of the writ of replevin, was in the due service of the writ in taking the bond on the part of the defendants to retain the property, *and the altered bond was accepted by the deputy-marshal, in pursuance of instructions or the interference of the attorney of the plaintiff, then these defendants are not to be held liable.*"

The second—

"The bond given to the deputy in the first instance, with the name of Remington on it as principal, was valid so far as it related to his being a party or obligor on said bond." It is for

the jury to determine whether the erasure was made in consequence of the interference of Mr. Hopkins, the attorney."

And last—

"The interference or consent of the plaintiff's counsel may be inferred in part from the fact of his afterwards acting on the bond as valid, and bringing suit thereon."

This amounts to no more than that these circumstances tend to prove the consent or approbation of plaintiff's attorney, and should be considered by the jury.

If either of these three propositions are correct in law, under a general exception to them in mass, the exception cannot be sustained by this court.

Johnston vs. Jones, 1 Black. 220.

WM. P. LYNDE,
Counsel for Defendants.

In Supreme Court of the United States.

No. 178.—December Term, 1863.

The United States of America, to the use of Fanny B. Rogers *et al.* Plaintiff in Error,
vs.
Edgar Conklin and others, Defendants in Error.

REPLY TO BRIEF OF DEFENDANTS IN ERROR.

MAT. H. CARPENTER,
Of Counsel for Plaintiff in Error.

In Supreme Court of the United States.

No. 178.—December Term, 1863.

The United States of America, to the use of Fanny B. Rogers *et al.* Plaintiff in Error,
vs.
Edgar Conklin and others, Defendants in Error.

REPLY TO BRIEF OF DEFENDANTS IN ERROR.

I.

The objection and exception to the admission of testimony, found on page 19, printed record, are sufficient.

It is not permitted to a party to object in so general a way as not to call the attention of the court to the precise thing claimed to be inadmissible; because that might impose upon the appellate court the trouble of deciding what would have been correctly decided in the court below, if the attention of the court had been called to it. This is the extent of the rule. This record shows that the precise evidence objected to was brought to the mind of the court. The issue was, whether the marshal's deputy had taken the mutilated bond in consequence of what the attorney had said to him. The question put, "what did Mr. Hopkins afterwards say about the bond?" was clearly inadmissible; and objecting to the question, was sufficient.

Mr. Lynde virtually admits that the objection and exception were sufficient, if the testimony was inadmissible for any purpose; and we submit, such was the case. Mr. Lynde says, page 2, brief, "can it be contended then that we had no right to ask what Hopkins said when the bond was taken to him the third time?" &c.

Now the whole case shows that the bond never was taken to Hopkins a *third time.* Record, p. 19 shows that the marshal took the bond and gave order for the delivery of the lumber. The question "what did Mr. Hopkins afterwards say about the bond?" meant "what did he say about it, *after you had received it and redelivered the property?*" and the witness was permitted to testify to what was said a month after the re-delivery of the property.

II.

The exceptions to the several instructions contained in the record, p. 20—Lynde's brief, page 3.

Rule 38 prescribed by the Supreme Court, was strictly observed by the Judge in allowing these exceptions. The bill of exceptions does not and does not purport to, set out the whole charge of the Court to the jury; the Judge has only set forth "the several matters in law in such charge to which" we excepted; and the bill of exception then says: "To *which* said *instructions*," &c. "the plaintiffs, by their counsel then and there in open court, *did except*, according to the course of practice of" the District Court: that is, according to the practice prescribed by the 38th rule, or, in other words, *did except to each of the several matters in law in said charge, which are inserted in this bill of exceptions.*

The principle of this rule is, that the party excepting should call the attention of the Court specifically to the matters objected to, so as to give the Court below an opportunity to correct any mistake in the charge. And the party will not be permitted to except generally to the charge, and afterwards make up his mind which particular propositions are erroneous.

The *three matters* which we excepted to are stated in the bill of exceptions, and it appears that to those we excepted, according to the practice of the Court; that is, severally to each.

III.

Are the instructions erroneous in law?

See Lynde's brief, pages 3, 4 and 5.

The cases cited by Mr. Lynde merely show, what we concede, that the plaintiff's attorney may, by special directions to the deputy, make the deputy his own, and not the marshal's agent in the execution of such special instructions; and that in such case the marshal is not liable for the act or neglect of the deputy.

The instructions excepted to do not put the case upon this ground. If Hopkins directed the erasure before it was done, and in the way it was done, we admit we cannot recover. But there is no pretense of this. Hopkins at first objected to a bond with Remington's name on it. But afterwards waived the objection by directing the deputy to accept *that bond*; [it was then signed by Remington,] if the name of Farwell, Ripley or Proudfit should be added.

Record, pages 18 and 19.

The name of Proudfit was added, and it was then the duty of the deputy under the instructions of Hopkins, as testified to by the deputy marshall himself (Record page 18,) to accept the bond. The erasure on the bond was made or permitted by the deputy against the very words of Hopkins last instruction. Therefore an instruction to the jury, that if they found that the deputy made the erasure, *in pursuance of the directions of Hopkins*, the Plaintiff could not recover, would have been useless to the Defendants; because the deputy's own testimony was the other way. But the instruction was, that if the erasure was made *in* CONSEQUENCE *of the interference* of the attorney.

2. The instruction that the interference or consent of the plaintiff's counsel might be inferred in part, from the fact of his afterwards acting on the bond as valid, and bringing suit thereon, was clearly erroneous. The cases cited by Mr. Lynde only show that when the party directly or by his attorney has induced a deputy to pursue some irregular line of conduct, he cannot recover therefor against the sheriff or marshal. He is, in such case, equitably estopped. But in this case the deputy was not at all influenced or injured, in consequence of the subsequent bringing of suit upon the bond. Such suit was in the interest of the marshal, and indeed a suit could not safely be commenced against the marshal until the validity of the bond had been tested.

Mr. Lynde argues that the bringing of suit on this bond after the release of the property by the deputy, is a ratification of the act of the deputy in mutilating the bond. This proposition we contest. But this is not the proposition we excepted to in the charge. The jury were told

that such subsequent suit was evidence that Hopkins assented to the alteration of the bond; and was erroneous even if Mr. Lynde could establish his proposition.

But we submit that the subsequent suit on the bond in which we were defeated upon the ground that the bond was void when taken, is no bar to our recovery against the marshal. Why should it be? The liability of the marshal was fixed by the acceptance of this mutilated bond and re-delivering the property to the defendant in the replevin case. How is it possible that this liability can be effected by a suit commenced in his name, and really for his benefit, to enforce the bond?

The deputy has done no act, assumed no liability, nor been at all injured by the bringing of such suit. This is not a case where we are equitably estopped, because our suit has not changed the condition or rights, or influenced the conduct of the marshal or his deputy.

MAT. H. CARPENTER,

Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 178.

THE UNITED STATES TO THE USE OF FANNY B. ROGERS, Adm'x. *et. als.*

vs.

EDGAR CONKLIN, *et. als.*

Brief for Plaintiff in Error.

MAT H. CARPENTER,

Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 178.

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Brief for Plaintiff in Error.

George T. Rogers commenced an action of replevin in the District Court for the District of Wisconsin July 23, 1857, against Henry W. Remington and John T. Martin Jr., and replevied certain lumber of the value of about eight thousand dollars.

Rule 10 "of writs and process" prescribed by the District Court, is as follows:

"Suits by replevin or other process not specified in these rules, shall be "commenced and proceeded in as required at the time, by the laws of "the State, subject to the rules of process and pleading in this Court."

The provisions of the State statute in force at the time this action was commenced, applicable to this case, are as follows:

Chap. 120, General Laws, Wisconsin 1856.

"Sec. 114. The plaintiff in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as provided in this chapter.

"Sec. 115. Where a delivery is claimed, an affidavit must be made by the plaintiff or by some one on his behalf, showing (1,) That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof, by virtue of a special property

therein, the facts in respect to which shall be set forth; (2.) That the property is wrongfully detained by the defendant; (3.) The alleged cause of the detention thereof, according to his best knowledge and belief; (4.) That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; and (5.) The actual value of the property.

"Sec. 116. The plaintiff may thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

"Sec. 117. Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action for the return of the property to the defendant, if the return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Sec. 119. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the Sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound, in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the Sheriff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in Section 124.

The plaintiff made and delivered to the Marshal the affidavit required by Sec. 115, and also the undertaking, in form of a bond, required by Sec. 117. Record pages 22, 23, 24. Thereupon the Marshal seized the property.

The defendants then delivered to the Marshal a bond (page 25 record)

for the purpose of obtaining re-delivery of the property to them, under Section 119. This bond the Marshal approved (page 26 record) and re-delivered the replevied property to the defendants. See Marshal's return page 24 record.

The replevin suit was duly prosecuted in the District Court, and on the 12th May, 1858, the said George T. Rogers, plaintiff, therein recovered judgment against Henry W. Remington, one of the defendants, for nine thousand two hundred and nine dollars and thirty-eight cents, with costs. See pages 32 and 33 record.

The defendant Remington being insolvent, Rogers commenced an action in the name of the Marshal on the bond given to him by the defendants in the replevin suit. On the trial, the defendants to that action proved that the bond was taken by the Marshal under circumstances that rendered it absolutely void when he received it from the defendants in the replevin suit.

Martin et. als. v. Thomas et. als. 24 How. 315.

Rogers then commenced this suit against the Marshal and his bail, for neglect of duty in re-delivering the property taken by him as aforesaid, without first receiving a bond or undertaking as required by law. At the trial of this suit in the court below the plaintiffs, representatives of Rogers, proved the proceedings in the original action, the issuing of the replevin writ, the delivery by Rogers to the Marshal of the bond and affidavit making it his duty to take the property, and that the Marshal did in fact execute the writ by taking the property, and the plaintiffs also proved that the Marshal took the bond from the defendants in the replevin suit under the circumstances, which were declared by this court, in Martin vs Thomas, to invalidate the bond; proved that the Marshal without requiring or receiving any other bond or undertaking, re-delivered the property to the original defendants, and proved the recovery of judgment in the original action, and the insolvency of Remington against whom the judgment was rendered. Still the verdict was against Rogers, and if the judgment upon it, shall be affirmed in this court, Rogers will be deprived of property worth over nine thousand dollars which has been adjudged to belong to him, and be without any remedy whatever.

A judgment will not be reversed merely because it is unjust. But where it is manifestly so, the least error appearing on the record which has or may have tendered to the result, will be sufficient to insure a new trial. Two such errors are shown in this case.

First. The theory of the defence as appears from the defendants notice, page 15 record, was that the defendants in the replevinsuit offered a bond to the Marshal signed by Remington the defendant and sureties, that Hopkins the attorney of Rogers objected to this bond, and refused to accept it "until the said Remington should procure the name of one Andrew Proudfit to said bond or undertaking, and until the name of the said Remington was taken off from the said bond, and that said Hopkins, attorney for said plaintiff in said replevin suit, assured the said Deputy Marshal that with said changes in said bond, he said Hopkins would accept said bond; that the said Remington procured the name of the said Andrew Proudfit to said bond and erased therefrom his own name, and delivered the same to the said Deputy Marshal; and thereupon the said Francis D. Fuller, Deputy Marshal as aforesaid, to wit: on the 29th day of July, 1857, at Madison, in the District of Wisconsin aforesaid, approved of the said bond, and delivered the said property to said defendants in said replevin suit, in pursuance of the advice and direction of the said Hopkins."

To establish this defence, the defendants proved without objection, everything that Hopkins said to the Marshal before he took the defective bond.

Then the counsel asked the witness, page 19 record, "What did Mr. Hopkins afterwards say about the bond?"

This question was objectionable:

1. Because the Marshal could not have been induced to takethe bond, by anything that was said after he had taken it; and

2. Because, admitting that what Hopkins said at the time he objected to the bond, was binding upon Rogers whom he was then representing in that behalf; yet, what he afterwards declared or admitted about it, could not bind Rogers. The rule is thus laid down in Story on Agency: "Where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter will also bind him, *if made at the same time*, and constituting part of the *res gestae*.

Story Agency, Sec. 134, cases cited.

See also 1 Green. Ev. Sec. 113, numerous cases cited.

But the Court overruled the objection, and permitted the witness to

state the declarations of Hopkins, made a month after the transaction in question.

Second. The whole testimony is set out in the bill of exceptions; and there is no conflict as to the facts. The testimony of the Deputy Marshal, page 18, 19, of record, shows that he was offered a bond signed by Remington the defendant in the original case, and sureties; that he took it to Hopkins, who said he would not have Remington's name on the bond at all, and that he was not satisfied with the sureties; that he returned the bond to Remington, telling him what Hopkins said; that Remington took the bond away, and came back with it the next day, with Keef's name added. That he then took it to Hopkins again, and Hopkins then told him that *if they would get Farwell, Ripley or Proudfit's name on the bond, to take it.* This is the last interview between Hopkins and the Marshal, before the bond was accepted; *and Remington's name was then on the bond.* The Marshal says he returned to Remington, gave him the bond again, and repeated what Hopkins had last told him; that Remington took the bond and got Proudfit's name upon it; and returned it to him the next day. It should be remembered that by Hopkin's last instructions, the Marshal was to take *that bond,* with Proudfit's name upon it. But when the bond was brought thus executed, the Marshal, instead of following Hopkin's last directions to to him, pretended to act upon the conversation with Hopkins at the first interview; when he said he would not have Remington's name on the bond at all; and so the Marshal permitted Remington to erase his name, in the absence of the sureties, which he did; thus invalidating the bond; yet the Marshal received it thus mutilated, and delivered the property to Remington. The Marshal does not say, and there is no proof showing that Hopkins even in the first interview, directed the name of Remington to be erased without the knowledge or consent of the other signers; or that he knew that the name of Remington had been erased, until the trial of the replevin suit. And Hopkins, who, as the Marshal testifies, had finally given directions to take the bond upon which Remington's name remained, provided the name of Proudfit was added, testifies that "When the bond was accepted by the Marshal, and the pro-"perty delivered, he had no notice or knowledge of the erasure in the

"bond; that he never saw the bond until the night before the trial of "the Replevin suit in Milwaukee; never heard of the erasure until that "evening."

Upon this state of facts, there is no more pretence for saying that Hopkins even in the first interview directed or consented to this erasure, than there is for saying that he directed the Marshal to *forge* the name of Proudfit to the bond. He objected to the bond because Remington's name was on it, and because Proudfit's was not; but it was the duty of the Marshal under these intructions to get the name Proudfit legally upon the bond, and the name of Remington legally off from it. But as the Marshal himself testifies, Hopkin's last instructions were to take the bond (and Remington's name was then on it,) if they procured Proudfits name to it.

But the Court instructed the jury, (page 20 record), "that if the altered "bond was accepted by the Deputy Marshal in pursuance of instructions, "*or the interference* of the attorney of the plaintiff, "then these defendants "are not to be held liable. The bond given to the deputy in the first in- "stance with the name of Remington on it as principal, was valid so far "as it related to his being a party or obligor on said bond. *It is for the "jury to determine whether the erasure was made in consequence of the "interference of Mr. Hopkins the Attorney.*"

It would have been correct to charge the jury that if the plaintiff or his attorney directed the erasure to be made in the absence of the other signers, and the Marshal erased it, acting under such instructions, the plaintiff could not recover. But the instruction in substance, was that if the Marshal made the erasure *in consequence* of the interference of Hopkins,—that is, because Hopkins interfered, the plaintiff could not recover. Now it is undoubtedly true that in a popular sense, and as it would be under stood by a jury, the erasure was made *in consequence* of what Hopkin's said; that is, if Hopkins had said nothing the Marshal would not have erased the name. So, if the Marshal after the first interview with Hopkins had *forged* Proudfits name to the bond, it might be said that he had done so, in consequence of Hopkins desiring his name on the bond. It was in this sense that the jury understood the charge. It must have been so intended by the judge; for there was no testimony tending to prove that Hopkins directed the erasure; on the contrary the Marshal himself testified that the last instructions of Hopkins were to take the bond if Proudfits name was obtained upon it, waiving the objection that it was signed by Remington.

Again the judge charged the jury, p. 20 record.

"The interference *or consent* of the plaintiff's counsel [to the "erasure] may be inferred in part *from the fact of his afterwards "acting on the bond as valid, and bringing suit thereon.*"

This was clearly erroneous; the testimony of all the witnesses clearly proved that Hopkins did not consent to the erasure at all, or even know of it till long afterwards. The erasure was a fact; the legal consequence of that fact upon the validity of the bond was matter of opinion. Conceding that when months afterwards Hopkins discovered that the erasure had been made, he thought as matter of law that the bond could be recovered upon; how does that opinion *tend* to show, *that he consented to the erasure?* This is the first time that a lawyers erroneous opinion as to the legal consequences of an act, has been held competent evidence tending to prove *that he consented to the commission of the act itself.*

We insist that if the evidence had been silent as to whether or not Hopkins consented to the erasure, it would have been error to instruct the jury that they could infer such consent from the mere fact of the subsequent suit on the bond. But the instruction in this case was worse; in this, that it permitted the jury to infer a fact that was completely disproved by the evidence of both parties.

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